

## DANGER AHEAD: RISK ASSESSMENT AND THE FUTURE OF BAIL REFORM

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*Abstract:* In the last five years, legislators in all fifty states have made changes to their pretrial justice systems. Reform efforts aim to shrink jails by incarcerating fewer people—particularly poor, low-risk defendants and racial minorities. Many jurisdictions are embracing pretrial risk assessment instruments—statistical tools that use historical data to forecast which defendants can safely be released—as a centerpiece of reform. Now, many are questioning the extent to which pretrial risk assessment instruments actually serve reform goals. Existing scholarship and debate centers on how the instruments themselves may reinforce racial disparities and on how their opaque algorithms may frustrate due process interests.

This Article highlights three underlying challenges that have yet to receive the attention they require. First, today’s risk assessment tools lead to what we term “zombie predictions.” That is, predictive models trained on data from older bail regimes are blind to the risk-reducing benefits of recent bail reforms. This may cause predictions that systematically overestimate risk. Second, “decision-making frameworks” that mediate the court system’s use of risk estimates embody crucial moral judgments, yet currently escape appropriate public scrutiny. Third, in the long-term, these tools risk giving an imprimatur of scientific objectivity to ill-defined concepts of “dangerousness,” may entrench the Supreme Court’s historically recent blessing of preventive detention for dangerousness, and could pave the way for an increase in preventive detention.

Pretrial risk assessment instruments, as they are currently built and used, cannot safely be assumed to support reformist goals of reducing incarceration and addressing racial and poverty-based inequities. This Article contends that system stakeholders who share those goals are best off focusing their reformist energies on other steps that can more directly promote decarceral changes and greater equity in pretrial justice. Where pretrial risk assessments remain in use, this Article proposes two vital steps that should be seen as

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minimally necessary to address the challenges surfaced. First, where they choose to embrace risk assessment, jurisdictions must carefully define what they wish to predict, gather and use local, recent data, and continuously update and calibrate any model on which they choose to rely, investing in a robust data infrastructure where necessary to meet these goals. Second, instruments and frameworks must be subject to strong, inclusive governance.

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## INTRODUCTION

### A. *The Story of Springfield*

Springfield County<sup>1</sup> has an open secret: It keeps many low-income people in jail who could safely be released. Most of these people are people of color. Two years ago, policymakers in Springfield joined a national trend, and approved a suite of reforms that they hoped would dramatically reduce the jail population. Their goal was to shrink the jail by detaining only those few defendants who were too risky to safely release pending trial, while sparing most of the large, low-income accused population from the life-altering consequences of even a short jail stay.

As a central focus of its reforms, Springfield adopted a popular “pretrial risk assessment tool”—a statistical tool that uses historical data to forecast and advise judges which defendants can be safely released at arraignment.<sup>2</sup> County leaders and local advocates believed that the tool itself, by providing objective information about the low risk posed by most defendants, would lead judges to release more defendants, reduce existing racial disparities in the pretrial jail population, and reduce rearrests and missed court dates among those released.

Buoyed partly by their optimism about the new digital tool, policymakers also approved several other changes that strengthened alternatives to pretrial incarceration, including drug counseling, text message reminders of upcoming court dates, and ankle-worn GPS monitors that could be mandated in lieu of incarceration. Two years after reform was introduced, the situation remains disappointing. Springfield’s average pretrial jail population has declined slightly, but the sweeping change supporters first imagined has not arrived. Moreover, the number of defendants remanded to custody with no offer of bail actually increased. And the number of individuals with *non-financial* conditions of release, especially GPS monitoring, has

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1. An imaginary—but otherwise typical—U.S. jurisdiction.

2. How pretrial risk assessment tools are developed and work in practice is detailed in section III.A.

skyrocketed. Rearrest rates remain the same, while failure to appear rates have risen slightly. And judges reject the risk assessment tool's recommendations in nearly half of cases—nearly always in a more punitive direction relative to what the tool recommended.<sup>3</sup>

In the wake of what was supposed to be landmark reform, local leaders are left asking: What happened? Several answers are apparent. First, Springfield's pretrial risk assessment tool has a numbers problem. The tool's predictions are based on historic patterns in the combined data of many other jurisdictions—places that often had higher crime rates than Springfield and that offered little-to-nothing in the way of pretrial services during the periods when the data was generated. The tool's predictions are neither tailored to Springfield nor updated to reflect the impact of Springfield's latest reforms. Taken together, these discrepancies have the perverse effect of not only making the accused in Springfield appear more likely to be rearrested or fail to appear to court than they truly are, but also of continuing patterns of unneeded jailing and encouraging overuse of restrictive conditions, like new GPS monitors.

Second, there is a moral question at the heart of every risk assessment tool—namely, how to balance various risks with the liberty and due process interests of the accused—and Springfield's leaders largely ignored that question. The “decision-making framework,” which converts raw risk assessment scores into proposed conditions of release, was treated as an afterthought, and in the end, the framework recommended far more defendants for burdensome conditions or detention than the reform's architects anticipated. As a result, the new tool's recommendations, even if strictly adhered to by judges, would not have done much to help Springfield achieve its stated goal of decarceration.

Third, the pretrial risk assessment tool was opaque, with vital information unavailable. Defendants, lawyers, and judges are not able to understand *what factors* led an individual to be forecast as a high risk of rearrest, nor could they learn precisely what data had been used, and in what way, to create the tool. Even if they had wanted to, Springfield officials would not have been able to update the system's underlying model with new pretrial release data.

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3. Throughout the Article, we use the term “judges” for the actors responsible for making pretrial decisions. Across the country, this title varies. We use “judge” for simplicity's sake.

### B. *Bail, Reform, and Risk Assessment*

The parable of Springfield is fictional but holds important lessons. For nearly a century, scholars have charted how the American system of money bail needlessly jails low-income defendants, often derailing their lives, simply because they cannot afford to pay for release.<sup>4</sup> Today, recognizing this problem, legislators and courts in many jurisdictions are exploring a wide range of reforms that replace or cabin money bail, aiming to provide reasonable assurance of the defendant's reappearance at trial and the protection of public safety *without* financial conditions. Reform steps are varied, and include drug diversion programs, GPS monitoring of people who are released, and pretrial services, such as reminding defendants of upcoming court dates.<sup>5</sup>

One popular reform, addressed in at least twenty laws in fourteen states since 2012, is the introduction of statistical risk assessment tools.<sup>6</sup> Such tools use historical data to describe how often defendants similar to the current one failed to appear for a court date, or were rearrested pending resolution of their cases. Until recently, risk assessments were widely portrayed as progressive tools that will help shrink jails by releasing indigent, low-risk defendants who could not afford to pay money bail. Last year, the National Association of Counties even called on local officials to adopt risk assessment tools, and a cohort of prominent public defense and criminal defense groups called for “the use of validated pretrial risk assessment in all jurisdictions, as a *necessary*

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4. See generally ARTHUR BEELEY, *THE BAIL SYSTEM IN CHICAGO 160* (1927) (documenting the inequities of the bail system, and also finding that “[t]he present system . . . neither guarantees security to society nor safeguards the rights of the accused”).

5. See NAT'L CONFERENCE OF STATE LEGISLATURES, *TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION 1–2* (2018) [hereinafter *TRENDS IN PRETRIAL RELEASE 2018*], [http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments\\_2017\\_v03.pdf](http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf) [https://perma.cc/CUQ5-V7ZP].

6. AMBER WIDGERY, NAT'L CONFERENCE OF STATE LEGISLATURES, *TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION 1* (2015) [hereinafter *TRENDS IN PRETRIAL RELEASE 2015*], [http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/NCSL%20pretrialTrends\\_v05.pdf](http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/NCSL%20pretrialTrends_v05.pdf) [https://perma.cc/P2YD-QW5W] (noting that “[f]rom 2012 to 2014, 261 new laws in 47 states addressed pretrial policy,” to show that the pace of legislation related to pretrial policy is also rapid). From 2012 to 2017, every state enacted a new pretrial policy—there were 500 new enactments, with 122 new enactments alone in forty-two states in 2015. See NAT'L CONFERENCE OF STATE LEGISLATURES, *TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE 1–2* (2017) [hereinafter *TRENDS IN PRETRIAL RELEASE 2017*], <https://comm.ncsl.org/productfiles/98120201/NCSL-Pretrial-Trends-Update.pdf> [https://perma.cc/HAN8-QX6N].

*component* of a fair pretrial release system.”<sup>7</sup> This Article offers a different view.

Part I describes how America’s approach to money bail arose, the injustices that American bail practices have always entailed, and the challenges and reversals earlier reform efforts faced. Part II describes today’s reform efforts, which are motivated by the enormous human and social costs that current bail regimes impose on the accused, their families, and their communities.

Part III explains the current practice of pretrial risk assessment and describes three underlying challenges that have yet to receive the attention they require. First, today’s risk assessment tools will likely lead to what we term “zombie predictions,” where old data, reflecting outdated bail practices, is newly reanimated through statistical prediction that is blind to the benefits of local or recent reforms. Jurisdictions often do not measure the changing landscape of actual risks their defendants face, let alone update their forecasts of risk to reflect that changing landscape. This Article argues that these issues lead many instruments to systematically overestimate risk, and it reviews early empirical evidence that suggests overestimation may already be occurring. Second, the “decision-making frameworks” that mediate the court system’s understanding and use of risk estimates embody crucial moral judgments and shape the impact of risk assessment tools on incarceration levels, yet currently escape broad public input and scrutiny. Harsh frameworks may undercut the apparent impact of other pretrial reforms, particularly when combined with exaggerated estimates of risk. Third, the embrace of pretrial risk assessment instruments exposes longer-term doctrinal and policy risks for advocates of bail reform. Specifically, these new tools risk giving an imprimatur of scientific objectivity to ill-defined concepts of “dangerousness,” and may entrench the Supreme Court’s recent blessing of preventive detention for dangerousness—which, in turn, could pave the way for a possible *increase* in preventive detention.

Part IV proposes two vital steps that are minimally necessary to address these core challenges. First, where they choose to embrace risk assessment, jurisdictions must rely on local, recent data; continuously update and calibrate any model on which they choose to rely; and carefully define what it is they wish to predict. Notably, these steps require resources: many jurisdictions will need to make new investments

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7. GIDEON’S PROMISE ET AL., JOINT STATEMENT IN SUPPORT OF THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS 4 (2017) (emphasis added), <https://www.publicdefenders.us/files/Defenders%20Statement%20on%20Pretrial%20RAI%20May%202017.pdf> [<https://perma.cc/7FE5-NA7R>].

to create a robust data infrastructure in order to become capable of wielding prediction responsibly. Second, where such instruments are used at all, the instruments and frameworks must be subject to strong, inclusive governance. Such governance should mean at least that the tools themselves never recommend detention, that the risk assessments and frameworks are public, and that the communities most impacted by mass incarceration are directly involved in shaping the tools and frameworks.

Part V concludes that pretrial risk assessment instruments, as currently used and implemented, cannot safely be assumed to advance reformist goals of reducing incarceration and enhancing the bail system's fairness. Early evidence remains sparse, and risk assessment instruments may yet prove themselves effective tools in the arsenal of bail reform. But, to date, they have not done so. Without careful design and open governance, this Article finds that it is more likely than not that these tools will perpetuate or worsen the very problems reform advocates hope to solve.

The United States has used money bail for more than a century, and reformers have been working for nearly as long to address its ills.<sup>8</sup> Now that risk assessment tools are becoming a widespread part of the pretrial landscape, basic justice and equity require a clear-eyed view of these tools, their limits, and how those limits can be addressed. This Article aims to contribute to that effort.

## I. AMERICA'S CONTESTED APPROACH TO BAIL

A bail hearing has always involved a prediction, but what is being predicted has changed. Historically, the goal of a bail hearing was to ensure a defendant's appearance for trial, and the question was what it would take to ensure the defendant's reappearance in court.<sup>9</sup> Bail hearings have since evolved to incorporate (and in many cases to center on) predictions of a criminal defendant's dangerousness—that is, the risk that he or she will commit future crimes if released.<sup>10</sup>

The story of this turn toward dangerousness begins, improbably, with the civil rights movement and what commentators often call the “first

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8. See *infra* Part II (detailing the history of bail and bail reform in the United States).

9. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OH. ST. L.J. 723, 731–34 (2011).

10. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2, 15–16 (1985).

formal generation” of bail reform.<sup>11</sup> These reforms focused on eliminating inappropriate uses of pretrial detention, especially among poor defendants.<sup>12</sup> The story ends after a second wave of bail changes, during which the Supreme Court ultimately held that the Eighth Amendment provides individuals with no absolute right to bail.<sup>13</sup>

The pendulum of policy change swung first toward more liberal release policies as a part of the civil rights movement, then reversed as conservatives in the Nixon and Reagan years reengineered pretrial practice toward a “*law and order*” approach.<sup>14</sup> Ultimately, this history suggests that risk assessment tools cannot safely be presumed to be instruments of decarceration, notwithstanding the widespread public hope that they will play that role.<sup>15</sup>

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11. Timothy Schnacke, *The Third Generation of Bail Reform*, in NAT'L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS 8, 9 (Deborah W. Smith, Charles F. Campbell & Blake P. Kavanagh eds., 2017), <https://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx> [<https://perma.cc/8T74-P4B5>].

12. See TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M.B. BOOKER, PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 10–12 (2010), [https://b.3cdn.net/crjustice/2b990da76de40361b6\\_rzm6ii4zp.pdf](https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf) [<https://perma.cc/W9XW-NM3P>].

13. *United States v. Salerno*, 481 U.S. 739 (1987).

14. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 134, 139 (2016) (emphasis added). Our understanding and framing is indebted to the work of historians and scholars who have critically examined the role of the Johnson Administration in, paradoxically, helping pave the way for the massive changes under the Nixon and Reagan administrations. See, e.g., *id.* at 14 (“By expanding the federal government’s power in the pursuit of twinned social welfare and social control goals, Johnson paradoxically paved the way for the anticrime policies of the Nixon and Ford administrations to be turned against his own antipoverty programs. Nixon merely appropriated the regressive aspects of the Johnson administration as his own . . .”); see also Elizabeth Hinton, “*A War Within Our Own Boundaries*”: *Lyndon Johnson’s Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 102 (2015) (“Far from being ambivalent about crime control as a major aim of domestic policy, Johnson and his radical domestic programs laid the foundation of the carceral state, opening an entirely new plane of domestic social programs centered on crime control, surveillance, and incarceration.”).

15. This observation, of course, is not new. Writing in 1992, Malcolm M. Feeley and Jonathan Simon detailed what they termed the “new penology,” which replaced “a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations.” Malcom M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452, 455 (1992). In their view, “[t]he new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups. It is concerned with the rationality not of individual behavior or even community organization, but of managerial processes. Its goal is not to eliminate crime but to make it tolerable through systemic coordination.” *Id.* See also Eric Silver & Lisa L. Miller, *A Cautionary Note on the Use of Actuarial Risk Assessment Tools for Social Control*, 48 CRIM. & DELINQ. 138, 157 (2002) (arguing that “[i]nsufficient attention has been paid to the negative potential embodied in actuarial social control technologies that, in the name of science and safety, increasingly conceptualize the individual in terms of population aggregates . . . [and] the activities that must follow once risk is assessed”).

### A. *The Origins of American Bail*

Historically, American criminal defendants were generally presumed to have a right to bail—the right either to be released outright until their trial, or else to obtain release subject to some judicially imposed (usually financial) condition.<sup>16</sup> The exceptions to this general rule were capital cases, where the threat of execution was presumed likely to impel a defendant to flee the jurisdiction if released.<sup>17</sup> In early American history, such release conditions typically took the form of a third-party “pledge”—someone known to the court who would be financially liable if the defendant failed to appear when required.<sup>18</sup> “Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes.”<sup>19</sup>

Between the late nineteenth and early twentieth centuries, the commercial bond industry superseded the personal surety system.<sup>20</sup> Despite that watershed revolution, a bail hearing’s predictive goal remained the same: ensuring a defendant’s appearance. For example, in

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16. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES \*296 (explaining that the accused must “put in securities for his appearance, to answer the charge against him”); TIMOTHY R. SCHNACKE, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM (2014).

17. This exception was longstanding. As William Blackstone wrote, “[f]or what is it that a man may not be induced to forfeit to save his own life?” 4 WILLIAM BLACKSTONE, COMMENTARIES \*297. Notably, a substantial number of crimes in the eighteenth century were capital offenses. *See, e.g.*, John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1227 (1969) (noting that “at that time the great majority of criminal offenses involving a threat of serious physical injury or death were punishable by death under state laws”).

18. SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 164 (2018).

19. Baradaran, *supra* note 9, 731.

20. First, the personal surety system of the early United States depended upon the sufficient availability of community members able to serve as sureties. But the pace at which the United States grew diluted the important community ties that made the personal surety click. Compounding this problem was a seemingly ever-expanding western frontier, which only appeared to increase an individual’s likelihood of flight. Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 n.38 (1993). Second, changes in court practice contributed to the demise of the personal surety system and “courts began eroding historic rules against profiting from bail and indemnifying sureties, slowly ushering in the commercial bail bonding business at the end of the century.” TIMOTHY R. SCHNACKE, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE’S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 26 (2014) [hereinafter MONEY AS A STAKEHOLDER]. These changes led states to experiment with new ways of ensuring a defendant’s appearance and administering bail, all of which “combined to give birth to . . . the commercial money bail bond industry.” SCHNACKE ET AL., *supra* note 12, at 6.

*Stack v. Boyle*,<sup>21</sup> the Supreme Court detailed how the commercial bail bond industry *complemented* the longstanding purpose of bail:

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial . . . Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.<sup>22</sup>

A bail hearing's officially narrow focus on ensuring a defendant would reappear at trial, however, was never the whole story. Unofficially, a defendant's predicted dangerousness has always mattered to some degree, and it "was widely acknowledged that judges deliberately set unaffordable bail amounts on pretextual flight risk grounds so that dangerous individuals would be detained until trial."<sup>23</sup> By setting unattainable bail amounts—a practice known as *sub rosa* preventive detention—judges were able to prevent defendants they believed to be dangerous from getting out of jail.<sup>24</sup>

Despite a recognition that judges sometimes did look to considerations *other* than flight risk in setting bail, the propriety of looking beyond flight risk was hotly contested. At the National Conference on Bail and Criminal Justice in 1964, the issue of preventive detention on account of a defendant's perceived dangerousness was described as "[p]erhaps the most perplexing of all problems."<sup>25</sup> Some argued that the "jailing of persons by courts because of anticipated, but uncommitted crimes, is a concept wholly at war with the basic traditions of American justice."<sup>26</sup> Others argued that the "possibility of preventive detention should be a matter of discretion in cases where the welfare and safety of the public is in peril."<sup>27</sup> The debate would run for more than a decade and, in the end, transform bail.

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21. 342 U.S. 1 (1951).

22. *Id.* at 4–5 (emphasis added).

23. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 848 (2016).

24. Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 503 (2018).

25. U.S. DEP'T OF JUSTICE & THE VERA FOUND., PROCEEDINGS AND INTERIM REPORT OF NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE xxix (1965), <https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf> [<https://perma.cc/XN24-GQ4W>].

26. *Id.* at 170.

27. *Id.* at 165.

*B. The Civil Rights Era: Fighting to End Poverty Jailings*

The early 1960s bail reform effort was tied to the larger movement for civil rights. It focused on the plight of poor defendants in crowded jails.<sup>28</sup> The commercial bail bond industry promised to assist defendants in financial distress. In reality, however, it helped create that distress, mostly by supporting widespread financial conditions and then charging steep up-front fees and collateral for their services.<sup>29</sup> Civil-rights era reformers built their advocacy, in part, on empirical work that established two key findings: that jails were overcrowded with defendants who could not meet financial conditions of release,<sup>30</sup> and that defendants with community ties could, in fact, be released safely—even when they could not afford to pay bail.<sup>31</sup>

These findings were not necessarily new. As early as 1927, a seminal report on Chicago's bail system detailed how poor defendants languished in pretrial detention solely because they could not pay small bail amounts.<sup>32</sup> Similarly, a 1954 study of bail in Philadelphia found that the “practical effect of Philadelphia[’s] methods for determining the amount of bail is to deny bail to . . . a substantial proportion of those charged with lesser crimes [and also] explain the chronic overcrowding in the untried department of the County Prison.”<sup>33</sup> Concern over New York's money bail system led the Vera Institute of Justice to design and implement the 1961 Manhattan Bail Project, which demonstrated that defendants with strong community ties could be released on their own recognizance without increasing rates of failure to appear.<sup>34</sup> Even if they

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28. Goldkamp, *supra* note 10, at 2; see also Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 417 (“The first reforms, in the 1960s, were aimed principally at eliminating the unregulated use of pretrial detention, primarily among poor defendants in urban jails. Reformers were critical of the conditions of confinement in American jails, the discriminatory setting of unaffordable bail for the urban poor and the indirect use of punitive detention.”).

29. MONEY AS A STAKEHOLDER, *supra* note 20, at 31.

30. *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954) [hereinafter *Administration of Bail in Philadelphia*].

31. See EVIE LOTZE ET AL., PRETRIAL SERVS. RES. CTR., THE PRETRIAL SERVICES REFERENCE BOOK 9 (1999), <https://pretrial.harriscountytexas.gov/Library1/The%20Pretrial%20Services%20Reference%20Book.pdf> [<https://perma.cc/D346-R7NU>]. The Manhattan Bail Project found that, after three years of operation, 65% of interviewees/arrestees could be safely released pretrial with only 1% of them failing to appear for trial. *Id.*

32. ARTHUR BEELEY, THE BAIL SYSTEM IN CHICAGO (1927).

33. *Administration of Bail in Philadelphia*, *supra* note 30, at 1048–49.

34. SCHNACKE ET AL., *supra* note 12, at 10 (“The project generated national interest in bail reform, and within two years programs modeled after the Manhattan Bail Project were launched in St. Louis, Chicago, Tulsa, Washington D.C., Des Moines, and Los Angeles.”).

were not necessarily revelatory, these findings spurred reform efforts that sought to minimize cash bail and increase the use of release alternatives.

In 1966 Congress responded by nearly unanimously passing the Bail Reform Act to “assure that all persons, regardless of their financial status, shall not needlessly be detained” pretrial.<sup>35</sup> The Bail Reform Act of 1966 sought to promote release on recognizance, and minimize reliance on money bail. It established that a defendant’s financial status should not be a reason for denying their pretrial release,<sup>36</sup> made clear that the risk of nonappearance at trial should be the only criterion considered when bail is assessed,<sup>37</sup> and mandated that non-capital defendants be released with the least restrictive set of conditions that would ensure their appearance at trial.<sup>38</sup> The Act also generally forbade judges from treating a defendant’s dangerousness or risk to public safety as a reason for detention.<sup>39</sup>

There were, however, three key exceptions to that rule: capital cases, cases where convicted defendants awaited sentencing, and cases where convicted defendants filed an appeal.<sup>40</sup> These exceptions represented the

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35. Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214 (codified as amended at 18 U.S.C. §§ 3146-3151 (2018)).

36. *Id.* § 2 (“The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance . . .”).

37. In making the determination that an individual would be likely to appear in court, the Act allowed judges to consider a wide range of factors, including the defendant’s “family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court.” 18 U.S.C. § 3146(b).

38. *Id.* § 3146(a).

39. In *United States v. Leathers*, the D.C. Circuit Court of Appeals held that the structure of the 1966 Act and “its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public.” 412 F.2d 169, 171 (D.C. Cir. 1969). That is because “only limited consideration was given to the protection of society from crimes which might be perpetrated by persons released under the Act; in fact, Congress specifically postponed consideration of those issues relating to crimes committed by persons released pending trial.” Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 32 (1969). Nevertheless, some of the legislative history indicates a belief that detaining a defendant because of “predicted—but as yet unconsummated—offense” was illegal. *Federal Bail Procedures: Hearing on S. 1357 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 3 (1965) (statement of Sen. Ervin, Chairman, S. Subcomm. on Constitutional Rights).

40. In the section of the Act that governed “release in capital cases or after conviction,” judges were expressly authorized to consider “danger to any other person or to the community” as a proper element in setting bail in such cases. Pub. L. 89-465, 80 Stat. 214, 216. Thus, a person accused of a capital offense and those who had been convicted of any offense and were appealing that conviction

first time in American history that a law authorized a judge to consider dangerousness as a legitimate reason to deny bail.<sup>41</sup> By allowing consideration of future dangerousness for a limited set of defendants, the Act opened a new door. If judges could consider future dangerousness for capital defendants, why not for other defendants, too? Were the circumstances so different?<sup>42</sup> By allowing judges to consider future dangerousness for one set of defendants, the new law legitimated the project of judicial predictions of dangerousness.<sup>43</sup>

C. *The 1970s and 1980s: Reversing Course to Address “Dangerousness”*

Shortly after these reforms arrived, the political consensus shifted decisively in the opposite direction.<sup>44</sup> Rising crime rates fed a perception that earlier efforts had focused too much on the welfare of the accused, and not enough on the welfare of the public.<sup>45</sup> Commentators observed

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or were awaiting sentencing could have their “danger to any other person or to the community” considered at a bail hearing. *Id.*

41. Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 958 (2013).

42. For an even more foundational examination of this line of questioning, see Mayson, *supra* note 24, at 497 (“One way to start thinking about what level of risk justifies restraint is to ask a related question: *is the answer different for defendants than for people not accused of any crime?*”).

43. John B. Howard, *The Trial of Pretrial Dangerousness: Preventive Detention after United States v. Salerno*, 75 VA. L. REV. 639, 645 (1989) (“Although some argued that the exception simply recognized the unique temptation of the capital defendant to flee, others justified the exception by pointing to the dangers to the community of releasing a capital defendant. *This latter argument, coupled with the view that bail is a statutory and not a constitutional right, formed the foundation of the argument in favor of the constitutionality of preventive pretrial detention.*” (emphasis added)).

44. See COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (Jeremy Travis, Bruce Western & Steven Redburn eds., 2014) (“The unprecedented rise in incarceration rates can be attributed to an increasingly punitive political climate surrounding criminal justice policy formed in a period of rising crime and rapid social change.”).

45. The recidivism problem might have been overstated. See, e.g., J.W. LOCKE ET AL., U.S. DEP’T OF COMMERCE, NAT’L BUREAU OF STANDARDS, *COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY 2* (1970), <https://www.gpo.gov/fdsys/pkg/GOVPUB-C13-f5b5e5adeed0d6f0c7faf442cd8ee7d4/pdf/GOVPUB-C13-f5b5e5adeed0d6f0c7faf442cd8ee7d4.pdf> [<https://perma.cc/8DEP-Z76R>] (providing statistics from a four-week period in 1968 in Washington D.C. showing that of 712 defendants who entered the District of Columbia Criminal Justice System, 11% of those released charged with misdemeanors or felonies were subsequently re-arrested on a second charge during the release period). But this rate is not wildly out of line with today’s levels of recidivism upon release—it is actually lower than what some jurisdictions experience today. See BRIAN REAVES, U.S. DEP’T OF JUSTICE, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 15*

that crimes committed by individuals released pretrial remained a significant problem,<sup>46</sup> in spite of the 1966 reforms.<sup>47</sup>

Civil unrest during the mid-to-late 1960s played a critical role in shifting perspectives.<sup>48</sup> Across the country, prosecutors and courts adopted ad hoc policies of preventive detention to “safeguard” the community from further unrest.<sup>49</sup> The 1968 Kerner Commission<sup>50</sup> even recommended that under emergency conditions like civil disorder, the judiciary should have pretrial plans and procedures that “permit separation of minor offenders from those dangerous to the community, in order that serious offenders may be detained.”<sup>51</sup> In many ways, the

(2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/C29F-J93B>] (showing that nationally, 16% of released defendants were rearrested).

46. Here, the *perception* of pretrial recidivism mattered as much as—if not more than—reality. In 1969, Alan Dershowitz noted that the “net result of bail reform [from 1966] . . . has been that more criminal defendants spend more time out on the street awaiting their trials than ever before. This has led to an increase—or at least the appearance of an increase—in the number of crimes committed by some of these defendants.” Alan M. Dershowitz, *On ‘Preventive Detention’*, N.Y. REV. BOOKS, Mar. 13, 1969, at 22 (emphasis added).

47. Miller, *supra* note 39, at 32.

48. Of course, civil unrest and disorder of the 1960s “helped foster a receptive environment for political appeals for harsher criminal justice policies and laws.” COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 44, at 115.

49. In fact, civil unrest during the mid-to-late 1960s played a direct role in these changes. The 12th Street Riot in Detroit, Michigan is an illustrative example. On July 23, 1967, police raided an unlicensed speakeasy, where nearly 100 people were celebrating the return of two black servicemen from Vietnam. Soon, a riot started, sparked by rumors of police abuse. The riot lasted for five days and left forty-three people dead, over 1,000 injured, and more than 7,000 arrested. In response to the disorder, Detroit’s public prosecutor stated that his office would ask for prohibitively high bonds on all those arrested “so that even though they had not been adjudged guilty, *we would eliminate the danger of returning some of those who had caused the riot to the street during the time of stress.*” William A. Dobrovir, *Preventive Detention: The Lesson of Civil Disorders*, 15 VILL. L. REV. 313, 316–17 (1970) (citing Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorders of July 1967*, 66 MICH. L. REV. 1542, 1549–50 (1968)) (emphasis added). One Detroit judge was quoted as saying that in cases like this, “[w]e will . . . allocate an extraordinary bond. We must keep these people off the streets. We will keep them off.” *Id.* at 317; *see also Criminal Justice in Extremis: Administration of Justice During the April 1968 Chicago Disorder*, 36 U. CHI. L. REV. 455, 576 (1969). The April 1968 riots which dominated Washington D.C. also temporarily brought a new standard for determining whether or not an arrestee should be released before trial: “whether in the judge’s view *he was likely to contribute to further disorder, to commit further offenses.*” Dobrovir, *supra*, at 322 (emphasis added).

50. The Kerner Commission, also known as the National Advisory Commission on Civil Disorders, was established by President Lyndon B. Johnson to investigate the underlying causes behind the 1967 race riots in the United States. The Commission found that poverty and institutional racism drove inner-city violence and called for aggressive federal spending to advance opportunities in African-American communities. *See NAT’L CRIMINAL JUSTICE REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)*, <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCjRS.pdf> [<https://perma.cc/373j-Ajy7>].

51. *Id.* at 17.

judicial response to the civil unrest of 1967 and 1968 not only further normalized the task of predicting dangerousness, but also of preventive detention more generally.

Against this backdrop, President Richard M. Nixon, elected in November 1968, included in his “War on Crime” a call for “temporary pretrial detention . . . [for people whose] pretrial release presents a clear danger to the community.”<sup>52</sup> Citing high-profile crimes committed in D.C. and other cities by defendants released pretrial,<sup>53</sup> the Nixon administration played a key role in raising the issue’s profile.<sup>54</sup> Of course, the focus of Nixon’s campaign and administration was never really on crime per se; race, more than anything, loomed large behind Nixon’s “War on Crime.”<sup>55</sup>

In 1969, President Nixon’s Attorney General John Mitchell made the public argument for the necessity of predictions of dangerousness and preventive detention.<sup>56</sup> Critically, he did so by drawing upon and exploiting logic of the Bail Reform Act of 1966. For example, Mitchell observed that the 1966 Act “specifically permits pretrial detention of defendants who are charged with capital crimes and are considered likely either to flee or pose a danger to the community.”<sup>57</sup> Next, Mitchell pointed out that no serious constitutional objection had been lodged against the practice of predicting a capital defendant’s future dangerousness. Finally, he noted that “objections to pretrial detention of dangerous defendants on the ground that it is improper to confine those not yet convicted apply with equal force to *existing pretrial detention practices*—detention because of risk of flight *or of dangerous capital offense defendants*.”<sup>58</sup> Above all, Mitchell argued that society had an equal right to assure that “those charged with noncapital but dangerous

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52. *Presidential Report*, 27 CONG. Q. WKLY. REP. 212, 238 (1969) (statement by President Nixon).

53. See PRESIDENT’S COMM’N ON CRIME IN D.C., REPORT ON THE METROPOLITAN POLICE DEPARTMENT 523 (1966), <https://babel.hathitrust.org/cgi/pt?id=umn.31951d02987368r;view=1up;seq=1> (last visited Nov. 12, 2018).

54. KARL E. CAMPBELL & SAM ERVIN, *LAST OF THE FOUNDING FATHERS* 217 (2007).

55. While the “southern strategy” is a historically problematic term, as both Republicans and Democrats had associated blackness with criminality, Nixon’s southern strategy was unique in that it “rested on politicizing the crime issue in a racially coded manner. Effectively politicizing crime and other wedge issues—such as welfare—would require the use of a form of racial coding that did not appear on its face to be at odds with the new norms of racial equality.” See COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 44, at 116.

56. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1240 (1969).

57. *Id.*

58. *Id.* (emphasis added).

crimes will not expose the community to unreasonable risks of danger prior to trial” and that, in making those predictions, “due process of law requires fundamental fairness, not perfect accuracy.”<sup>59</sup>

Many objected to this line of argument,<sup>60</sup> but Mitchell’s arguments carried the day. Though the underlying philosophies motivating policy change could not have been more different, Nixon-era reformers exploited the logic and toolkit of reforms driven by civil rights leaders for their own purposes.

Soon, a second generation of bail changes swept state and federal courts, enlisting judges en masse in the work of predicting defendants’ dangerousness. The 1970 District of Columbia Court Reform and Criminal Procedure Act<sup>61</sup> (the D.C. Act) represented the first legislative move in this second wave of reform efforts, reaching outside the context of capital cases to allow “judges to detain a defendant pretrial without setting any bail if the defendant was deemed dangerous to society.”<sup>62</sup> The D.C. Act had an immediate impact across the country: within eight years of its enactment, almost half of all states passed legislation pointing to danger as a factor in bail decisions.<sup>63</sup> By 1984, the number of laws passed had grown to thirty-four.<sup>64</sup> Four states—Nebraska and Texas in 1977, Michigan in 1978, and Wisconsin in 1981—amended their state constitutions to allow denial of bail to defendants deemed to be dangerous.<sup>65</sup> Meanwhile, at the national level, a progression of Supreme Court cases—including *Jurek v. Texas*,<sup>66</sup> *Bell v. Wolfish*,<sup>67</sup>

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59. *Id.* at 1241–42.

60. The American Bar Association argued that courts could not “with any degree of tolerable accuracy predict in advance the defendants who will commit a further crime.” *ABA Opposes Preventive Detention in Congressional Testimony*, 1 ABA SEC. INDIVIDUAL RTS. & RESPS. NEWSL. 4 (1969). An ABA committee considering the issue expressed “serious misgivings” on the proposals, noting that the “purpose of bail is to insure the defendant’s presence at the time of trial.” William H. Erickson, *The Standards of Criminal Justice in a Nutshell*, 32 LA. L. REV. 369, 377 (1972). Laurence Tribe and other scholars replied in part that a scheme authorizing pretrial detention based on future danger “has all the vices inherent in a law that makes the crime fit the criminal.” Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 375, 392 (1970).

61. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

62. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 504 (2012).

63. *Id.* at 506.

64. *Id.*

65. Donald B. Jr. Verrilli, Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 353–54 (1982).

66. 428 U.S. 262 (1976).

67. 441 U.S. 520 (1979).

*Barefoot v. Estelle*,<sup>68</sup> and *Schall v. Martin*<sup>69</sup>—led the Court to bless predictions of dangerousness, and approve the pretrial detention of allegedly dangerous defendants, even when they did not pose a flight risk.<sup>70</sup>

The Reagan administration, with overwhelming Democratic support, pushed these changes further, relying on similar tactics and rhetoric as the Nixon administration.<sup>71</sup> The eventual 1984 Bail Reform Act became

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68. 463 U.S. 880 (1983).

69. 467 U.S. 253 (1984).

70. *Jurek v. Texas* did not involve bail or pretrial detention. 428 U.S. at 262. In upholding the Texas death penalty statute, the Supreme Court concluded that predictions of dangerousness are “an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge’s prediction of the defendant’s future conduct.” *Id.* at 275. Importantly, the Court observed that though “[i]t is, of course, not easy to predict future behavior,” the “fact that such a determination is difficult, however, does not mean that it cannot be made.” *Id.* at 274–75. *Bell v. Wolfish* considered the conditions of confinement for pretrial detainees at the Metropolitan Correctional Center (MCC) in New York City. 441 U.S. at 539. In finding that the MCC’s conditions of confinement did not infringe on a pretrial detainee’s constitutional rights, the Court held that, as one scholar puts it, “due process only requires that pretrial detainees be free from ‘punishment,’ rather than from a restraint of liberty.” Baradaran, *supra* note 9, at 744. The Court noted that punishment does not exist pretrial if an action is “reasonably related to a legitimate governmental objective.” *Bell*, 441 U.S. at 539. “[I]n addition to ensuring the detainees’ presence at trial, [other objectives] may justify [the] imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.” *Id.* at 440. In *Barefoot*, the Court authorized contentious expert testimony about dangerousness in a capital case, further illustrating a growing openness toward predictions of future criminality. 463 U.S. at 916. *Schall* upheld a New York state statute that authorized the preventive detention of juvenile delinquents. 467 U.S. at 253. Echoing the sentiments of *Jurek*, Chief Justice Rehnquist noted that, “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct” and that the Court had “specifically rejected the contention . . . ‘that it is impossible to predict future behavior and that the question is so vague as to be meaningless.’” *Id.* at 278–79 (citation omitted). And though the Court had previously left open the question as to whether any government objective other than ensuring a pretrial detainee’s presence at trial could survive constitutional scrutiny, the Court in *Schall* definitively closed the door. “Preventive detention [under the statute] serves the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime.” *Id.* at 274. In other words, in *Schall*, the Court for the first time held that pretrial detention based on objective other than ensuring a defendant’s appearance at trial passed constitutional muster.

71. For example, the case for bail reform in the 1980s rested on the familiar perception that the rate of pretrial recidivism was “extremely high,” despite strong contradictory evidence. See *Comprehensive Crime Control Act of 1983: Hearing on S. 829 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. 285, 286 (1983) (statement of LeRoy S. Zimmerman, National Association of Attorneys General) (testifying that because “the rate of recidivism for individuals released on bail is extremely high, consideration must be given to the dangerousness of the defendant and the risk to the community should he be released on bail pending trial”); H.R. REP. NO. 98-1121, at 11 (1984); *Bail Reform Act of 1981–82: Hearing on H.R. 3006, H.R. 4264, and H.R. 4362 Before the H. Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 87 (1981) (prepared statement of Guy Willetts, Chief of the Pretrial Services Branch, Division of Probation, Administrative Offices of the

law with broad support.<sup>72</sup> It “made public safety a central concern in the judicial officer’s choice [among] . . . pretrial custody options.”<sup>73</sup> For the first time at the federal level,<sup>74</sup> judges were asked to predict the danger a defendant’s release posed to the community.<sup>75</sup> By 1984, “dangerousness” was included as a factor in bail decisions under federal law and in nearly two-thirds of the states.

But these laws suffered from a common problem: how to define “danger.” Clues from the federal law pointed to a fairly broad definition of what judges could consider. For example, the Senate Committee on the Judiciary’s report noted that “the risk that a defendant will continue to engage in [drug] trafficking constitutes a danger to the ‘safety of any other person or the community.’”<sup>76</sup> Even the risk of *non-violent* crimes, such as those against property, satisfied this expansive “danger” standard. State laws also consistently failed to provide specific standards to determine whether a defendant was “dangerous.”<sup>77</sup>

Despite these deficiencies, in 1987, the Supreme Court upheld the Bail Reform Act of 1984 as constitutional, and in turn, sanctioned preventive detention and predictions of dangerousness pretrial.<sup>78</sup> In *United States v. Salerno*,<sup>79</sup> the Court held that the Eighth Amendment does not grant an individual an absolute right to bail, that the denial of bail on the basis of dangerousness does not violate the Eighth Amendment, and that pretrial detention was a regulatory act, not

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United States Courts) (testifying that in a sample of ten jurisdictions, “new crimes committed by federal offenders released on bail occurred at a rate of 8.4 percent”).

72. Stuart Taylor Jr., *Senate Approves an Anticrime Bill*, N.Y. TIMES, Feb. 3, 1984 (“The Senate today passed a bipartisan package that supporters call the most significant Federal anticrime measure in more than a decade. The vote was 91 to 1.”).

73. Goldkamp, *supra* note 10, at 42.

74. *See, e.g.*, *United States v. Himler*, 797 F.2d 156, 158–59 (3d. Cir. 1986) (“*The 1984 Act marks a radical departure from former federal bail policy.* Prior to the 1984 Act, consideration of a defendant’s dangerousness in a pretrial release decision was permitted only in capital cases . . . . Under the new statute judicial officers must now consider danger to the community in all cases in setting conditions of release.” (emphasis added)).

75. Notably, the legislative history of the 1984 law demonstrates that Congress clearly understood they were transforming the fundamental premise of bail. *See, e.g.*, Curtis E. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 7 (2008).

76. *See* S. REP. NO. 98-225, at 103 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3196, 1983.

77. Goldkamp, *supra* note 10, at 17–18. (“Over one-third of the public safety-oriented laws provide no definition of danger. . . . In approximately half of the states with explicit references, the definition of danger is vague.”)

78. *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception.”).

79. 481 U.S. 739 (1987).

punishment.<sup>80</sup> In just over two decades, the predictive task of a bail hearing was fundamentally transformed. By 1987, states were passing laws mandating that “public safety be the primary [predictive] consideration” at a bail hearing.<sup>81</sup>

Throughout this period, conservative-minded reformers publicly argued that their set of bail reforms would make bail more honest by eliminating *sub rosa* detention through high bail. But more than three decades later, “after federal and state statutes were rewritten . . . [to] permi[t] judges to order dangerous defendants to be detained, money bail is still used as a back-door means to manage dangerousness.”<sup>82</sup>

In fact, what began in the mid-1960s as an effort to reduce poverty-based detention ended in the mid-1980s with a law that led to immediate and lasting increases in pretrial detention.<sup>83</sup> Bail reform’s pivot in the late 1960s from a focus on unnecessary pretrial detention, to a focus on widespread prediction of dangerousness, took a mere two years. Critically, this pivot relied on law and order reformers successfully subverting the logic and tools of previous liberal reform efforts. That current reform efforts bear striking similarities to those discussed here should caution liberal reformers.<sup>84</sup>

## II. BAIL IN PRACTICE TODAY

Across the country, after someone is arrested, they appear at a bail hearing. Sometimes the accused appears in court via videoconference from jail. Other times, the accused, en masse, sit in a makeshift courtroom in a jail for their arraignment. Specific practices vary widely from jurisdiction to jurisdiction. Nevertheless, at bail, the law generally

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80. *Id.* at 753–55 (rejecting “the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release” and noting that “when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail”).

81. Karnow, *supra* note 75, at 8.

82. Gouldin, *supra* note 23, at 863.

83. The U.S. Marshals Service found that there was “a 32 percent increase in prisoner population . . . during the first year after its passage.” John Riley, *Preventive Detention Use Grows—But Is It Fair?*, NAT’L L.J., Mar. 24, 1986, at 1. Three years later, a General Accounting Office report found that the 1984 Bail Reform Act led to a “greater percentage of defendants remain[ing] incarcerated during their pretrial period under the new law than under the [1966] law.” U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 18 (1987) <https://www.gao.gov/assets/150/145896.pdf> [<https://perma.cc/K8QE-6CV2>].

84. *See infra* section II.C.

asks a judge to assess the risk that a defendant will flee the jurisdiction, or whether the defendant would pose a danger to the community if released. The judge is asked to order the least restrictive set of conditions needed to ensure the defendant appears at future court dates and does not harm the community in the meantime.<sup>85</sup>

If a judge predicts, or a bail schedule requires, that no feasible combination of conditions could adequately ensure the defendant's appearance for their trial, nor protect public safety, then that individual is non-bailable, or not eligible for release before trial. These defendants will be remanded to custody and will wait in jail until their trial or other resolution of their case. On the other hand, if a judge believes that the defendant will appear for trial and does not think the defendant will be a danger to the community if released, or believes that some set of conditions would ensure these criteria, then that individual is bailable and eligible for some form of pretrial release. Complicating matters, in some jurisdictions a judge is constrained by a bail schedule, where certain crimes merit certain statutorily determined conditions.

There are three basic approaches to release:

*Release on personal recognizance* (sometimes called "ROR"): The defendant promises to reappear for his or her future court dates with no judicially imposed restrictions or conditions.<sup>86</sup>

*Conditional release*: The defendant is released with non-monetary conditions, such as a requirement to check in with a pretrial services agency, undergo drug treatment, or wear a GPS monitoring ankle.<sup>87</sup>

*Release on bond*: A set financial obligation is defined that the defendant will have to pay if she fails to return to court when required. A secured bond means the defendant must pay the amount up front in order to be released from jail, while an unsecured bond means that the defendant is released without paying but will become liable for the defined amount if she fails to appear in the future.<sup>88</sup>

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85. Again, practices can vary widely across jurisdictions. We only generalize the process for the sake of clarity.

86. *See, e.g.*, WASH. SUPER. CT. CRIM. R. 3.2(a) ("Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance . . . be ordered released on the accused's personal recognizance pending trial unless [one of several factors is met].").

87. *See, e.g.*, OR. REV. STAT. § 135.230(d) (2017) ("'Conditional release' means a nonsecurity release which imposes regulations on the activities and associations of the defendant.").

88. *See, e.g.*, VA. CODE ANN. § 19.2-123(2a), (3) (2018) ("[A]ny judicial officer may impose any one or any combination of the following conditions of release: . . . Require the execution of an unsecured bond; [or] [r]equire the execution of a secure bond which at the option of the accused shall be satisfied with sufficient solvent sureties, or the deposit of cash in lieu thereof.").

Judges can also combine an offer of conditional release with a financial bond. Even when a judge sets a condition of release, the defendant still may not be freed before trial. For example, when a secured bond amount is set, the defendant remains in jail unless and until that money is given to the authorities. Many jurisdictions abide by a “10 percent” rule, where defendants only need to post 10% of a bond to secure their release that day. Funds can come from the defendant directly, from a friend, relative or community member, from a bail fund, or from a commercial bail bondsman (more on that below). But across the country, low income defendants struggle and are often unable to raise the necessary funds. Even though a judge has approved a path for their release, they remain in jail.

#### A. *Motivations for Reform*

Bail decisions can upend people’s lives. Before a trial has begun, without any finding of guilt, a judge may nonetheless deprive the defendant of her liberty, or impose a range of other burdens, during the weeks, months, or years that may pass until guilt or innocence is finally determined. Those who are denied bail, or who are offered it on terms they cannot afford, must stay in jail until trial. While they wait, they often lose their jobs, face eviction from their homes, and otherwise watch their lives crumble.

Pretrial detention plays a central role in America’s globally extraordinary patterns of incarceration. On any given day in the United States, more than 400,000 individuals are detained and awaiting trial.<sup>89</sup> The total population estimated to be in local jails nationally is up about 20% since 2000, and 95% of that growth is attributable to people awaiting trial.<sup>90</sup>

Two specific motivations deserve to be highlighted. First, the longstanding ills of money bail remain. Inability to pay bail is the primary reason why pretrial defendants stay in jail until the disposition of their cases.<sup>91</sup> Compounding the problem, the proportion of felony

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89. TODD D. MINTON & ZHEN ZENG, U.S. DEP’T OF JUSTICE, JAIL INMATES AT MIDYEAR 2014, at 3 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf> [<https://perma.cc/J9P3-KCR5>].

90. *Id.* at 4.

91. The most recent statewide data available shows that 38% of felony defendants in the largest seventy-five counties were detained until the end of their case. Of that group, about 90% were detained because they were unable to meet the financial conditions offered for release. The percentages are essentially the same for felony defendants in state courts, too. REAVES, *supra* note 45; *see also* THOMAS COHEN & BRIAN REAVES, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE OF

defendants subject to some financial condition for their release has skyrocketed.<sup>92</sup>

Second, and relatedly, the human cost of pretrial detention is staggering. A growing body of research indicates that pretrial detention *itself* directly increases the probability of worse case outcomes for the defendant—meaning a guilty plea or conviction at trial.<sup>93</sup> Further, recent research shows that pretrial detention *worsens* the risks that judges aim to predict. That is, pretrial detention itself leads to higher rates of pretrial rearrests, more failures to appear, and greater long-term recidivism than the same defendants would have shown if immediately released.<sup>94</sup> This finding has significant import for our core thesis, discussed in sections III.B.2 and B.3.

### B. *The Shape of Current Reforms: Away from Money, Toward Risk*

Today's reform efforts mark what some call the third generation of bail reform.<sup>95</sup> The pace of reform is rapid, and the shape of reforms is varied. A central goal of most of these efforts is to end the wealth-based system, and move pretrial justice systems toward a risk-based model.<sup>96</sup>

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FELONY DEFENDANTS IN STATE COURTS 2 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/NZ9N-XACT>].

92. From 1990 to 2009, the overall percentage of felony cases involving some sort of financial condition for release rose from just over one-third to nearly two-thirds of all releases. Meanwhile, the fraction of outright releases (without conditions) declined apace. *See* REAVES, *supra* note 45.

93. KRISTIAN LUM & MIKE BAIOCCHI, THE SAUSAL IMPACT OF BAIL ON CASE OUTCOMES FOR INDIGENT DEFENDANTS 1 (July 15, 2017) (“It has long been observed that those who are detained pre-trial are more likely to be convicted, but only recently have formal causal inference methods been brought to bear on the problem of determining whether pre-trial detention causes a higher likelihood of conviction. In each case where causal inference methods were used, a statistically significant effect was found.” (citations omitted) (emphasis omitted)); *id.* at 4 (“We find a strong causal relationship between setting bail and the outcome of a case . . . for cases for which different judges could come to different decisions regarding whether bail should be set, setting bail results in a 34% increase in the chances that they will be found guilty.”); *see also* EMILY LESLIE & NOLAN G. POPE, THE UNINTENDED IMPACT OF PRETRIAL DETENTION ON CASE OUTCOMES: EVIDENCE FROM NYC ARRAIGNMENTS (2016); MEGAN STEVENSON, DISTORTION OF JUSTICE: HOW INABILITY TO PAY AFFECTS CASE OUTCOMES (2016).

94. *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. (2017); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA AND JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION (2013); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEG. STUD. 1, 3 (2016).

95. Timothy R. Schnacke, Claire M.B. Brooker & Michael R. Jones, *The Third Generation of Bail Reform*, DEN. L. REV. ONLINE (Mar. 14, 2011), <http://www.denverlawreview.org/dlronlinearticle/2011/3/14/the-third-generation-of-bail-reform.html> [<https://perma.cc/N64N-6PSY>].

96. SCHNACKE, *supra* note 16, at 36.

In many states, legislatures are the first movers of reform. Since 2012, over 500 bills across all fifty states were enacted related to pretrial justice, including financial and non-financial conditions for release, pretrial services and supervision, diversion programs, citation in lieu of arrest, and victim support and services.<sup>97</sup> In 2016, forty-four states enacted nearly 120 laws related to pretrial administration.<sup>98</sup> Almost two-thirds of those states enacted some sort of law related specifically to pretrial diversion.<sup>99</sup>

Twelve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses be released on personal recognizance or unsecured bond “unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention.”<sup>100</sup> Six more states have done so by court rule.<sup>101</sup>

Recent legislation also directly targets money bail. In June 2017, Connecticut passed legislation that barred “cash-only” bail for certain crimes and prohibits courts from imposing a financial condition of release on defendants charged with only a misdemeanor crime.<sup>102</sup> New Jersey’s comprehensive bail reforms took effect in January 2017, virtually eliminating cash bail across the state.<sup>103</sup> Illinois enacted legislation in June 2017 that requires judges to use the least restrictive conditions to assure a defendant’s appearance, with a presumption that any conditions of release would be non-monetary.<sup>104</sup> In early 2017, New

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97. TRENDS IN PRETRIAL RELEASE 2017, *supra* note 6.

98. TRENDS IN PRETRIAL RELEASE 2018, *supra* note 6, at 5.

99. *Id.*

100. ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM’RS, 2012-2013 POLICY PAPER EVIDENCE-BASED PRETRIAL RELEASE 3 (2012), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx> [<https://perma.cc/BTM3-YPYG>].

101. *Id.*

102. An Act Concerning Pretrial Justice Reform, 2017 Conn. Acts 716 (Reg. Sess.). Three exceptions exist to the new misdemeanor release rule: if (1) person is charged with a family violence crime, (2) if a person requests such conditions, or (3) court makes a finding on the record that there is a likely risk that the arrested person will fail to appear in court, will obstruct or attempt to obstruct justice, or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, or the arrested person will engage in conduct that threatens the safety of himself or herself or another person. *Id.*

103. Act of Aug. 11, 2014, ch. 31, 2014 N.J. Laws 467.

104. Bail Reform Act of 2017, No. 100-1, 2017 Ill. Legis. Serv. (West). The law also allows the state supreme court to establish a pretrial risk assessment tool, but does not require it. The state’s Administrative Office of the Courts already indicated its support for pretrial risk assessment, as did the Illinois Supreme Court in a statewide policy statement. *See Illinois Supreme Court Adopts Statewide Policy Statement for Pretrial Services*, ILL. ST. BAR ASS’N: ILL. LAW. NOW (May 1,

Orleans's City Council passed an ordinance eliminating cash bail for defendants charged with minor, non-violent crimes.<sup>105</sup> A new rule promulgated by Maryland's Court of Appeals that instructs judges to first look to non-financial conditions of release went into effect on July 1, 2017, after the legislators in the state failed to pass new legislation before their session ended.<sup>106</sup> Atlanta's City Council passed an ordinance eliminating a cash bond requirement for low-level offenses<sup>107</sup>; Alaska enacted new reforms that eliminate money bail for most defendants<sup>108</sup>; and multiple New York City district attorneys have ordered prosecutors not to request money bail in most cases.<sup>109</sup>

Among the most popular reforms are policies that introduce or expand pretrial services and, at the same time, either introduce or expand actuarial risk assessment. Since 2012, at least twenty laws in fourteen states either created or standardized the use of pretrial risk assessment.<sup>110</sup> In 2014 alone, eleven laws were passed to regulate how risk assessment tools were used pretrial. Almost half of the states that passed laws relating to pretrial services between 2012 and 2014 authorized or created statewide pretrial service programs.<sup>111</sup> Cities and counties across the country have experimented with pretrial risk assessment—some develop their own tools, while others implement or purchase another tool.<sup>112</sup>

Among policymakers, actuarial tools enjoy broad support across the political spectrum. The American Bar Association specifically recommends that judges use actuarial models in making bail

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2017), <https://www.isba.org/iln/2017/05/01/illinois-supreme-court-adopts-statewide-policy-statement-pretrial-services> [https://perma.cc/TS5K-XM23].

105. Jessica Williams, *City Council Unanimously Passes Overhaul to Municipal Court Bail System: Fewer Defendants Will Have to Post Bail*, NEW ORLEANS ADVOC. (Jan. 12, 2017), [http://www.theadvocate.com/new\\_orleans/news/courts/article\\_eb41d288-d90b-11e6-b99c-4bb3e5442d1b.html](http://www.theadvocate.com/new_orleans/news/courts/article_eb41d288-d90b-11e6-b99c-4bb3e5442d1b.html) [https://perma.cc/BFP9-E8NJ].

106. Michael Dresser, *Maryland Court of Appeals: Defendants Can't Be Held in Jail Because They Can't Afford Bail*, BALTIMORE SUN (Feb. 8, 2017), <http://www.baltimoresun.com/news/maryland/bs-md-bail-rule-20170207-story.html> [https://perma.cc/VC79-G8LD].

107. Rhonda Cook, *Atlanta Mayor Signs New Ordinance Changing Cash Bail System in a Nod to the Needy*, ATLANTA-J. CONST.: MYAJC, (Feb. 5, 2018), <https://www.myajc.com/news/local/atlanta-council-oks-changes-cash-bail-system-nod-the-needy/SW50dABJAtWgBwpB4vtgBN/> [https://perma.cc/XF8M-JPMZ].

108. *Senate Bill 91: Summary of Policy Reforms*, ALASKA JUST. F., Spring 2016, at 1, 2–4.

109. James C. McKinley Jr., *Some Prosecutors Stop Asking for Bail in Minor Cases*, N.Y. TIMES, (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/nyregion/bail-prosecutors-new-york.html> (last visited Nov. 12, 2018).

110. WIDGERY, *supra* note 6, at 1.

111. *Id.* at 3.

112. Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 442 (2016).

determinations.<sup>113</sup> A cohort of prominent public defense and criminal defense groups recently called for “the use of validated pretrial risk assessment in all jurisdictions, as a *necessary component* of a fair pretrial release system.”<sup>114</sup> The National Association of Counties recently adopted a resolution calling on the U.S. Department of Justice to advise state and county governments to adopt pretrial risk assessment and eliminate commercially secured bonds.<sup>115</sup> The Conference of State Court Administrators (COSCA)<sup>116</sup> and the Conference of Chief Justices have both called for the use of risk assessment.<sup>117</sup>

Most notably, during the time in which this Article was being edited, California passed, and its governor signed, Senate Bill 10 into law.<sup>118</sup> The law completely eliminates California’s money bail system, replacing it with a system based on risk assessment.<sup>119</sup> Despite significant, looming implementation hurdles—including a proposed referendum to repeal it<sup>120</sup>—the law is scheduled to take effect October 1, 2019.<sup>121</sup>

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113. ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 5–6 (3d ed. 2007) (see standard 10.1.10 discussing the role of the pretrial services agency in determining release eligibility for defendants).

114. GIDEON’S PROMISE ET AL., *supra* note 7, at 4. The groups involved included the American Council of Chief Defenders, Gideon’s Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defenders Association. *See id.* at 1.

115. NAT’L ASSOC. OF CTYS., ADOPTED INTERIM POLICY RESOLUTIONS 11 (2017), <http://www.naco.org/> [<https://perma.cc/22YU-LKM6>] (explaining the policy resolution on improving the pretrial justice process).

116. PEPIN, *supra* note 100.

117. CONFERENCE OF CHIEF JUSTICES, ENDORSING THE CONFERENCE OF STATE COURT ADMINISTRATORS POLICY PAPER ON EVIDENCE-BASED PRETRIAL RELEASE (2013), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx> [<https://perma.cc/9656-249H>] (adopting the policy as proposed by the CCJ/COSCA Criminal Justice Committee at the Conference of Chief Justices midyear meeting).

118. Act of Aug. 28, 2018, ch. 244, 2018 Cal. Legis. Serv. (West) (S.B. 10).

119. The California Judicial Council is statutorily tasked with “[c]ompil[ing] and maintain[ing] a list of validated pretrial risk assessment tools” that jurisdictions may use. *Id.* § 1320.24(e)(1). According to the law, a validated risk assessment tool is one that “shall be demonstrated by scientific research to be accurate and reliable in assessing the risk of a person failing to appear in court as required or the risk to public safety due to the commission of a new criminal offense if the person is released before adjudication of his or her current criminal offense and minimize bias.” *Id.* § 1320.7(k).

120. Bob Egelko, *Bail Bond Companies Gathering Signatures for Referendum to Keep Them in Business*, S.F. CHRONICLE (Sep. 11, 2018, 6:10 PM), <https://www.sfchronicle.com/news/article/Bail-bond-companies-seek-to-block-new-law-that-13221653.php> [<https://perma.cc/CZ9U-LYMK>].

121. Act of Aug. 28, 2018, ch. 244, § 1320.6, 2018 Cal. Legis. Serv. (West) (S.B. 10).

However, a growing chorus of advocates have begun to raise some objections. For example, Human Rights Watch argues that pretrial risk assessment tools should be opposed “entirely.”<sup>122</sup> Over a hundred community and advocacy groups in New York recently argued that pretrial risk assessment tools will “further exacerbate racial bias in [the] criminal justice system” and that the tools will “likely lead to increases in pretrial detention in the state.”<sup>123</sup> And a broad range of more than 100 civil rights, social justice, and digital rights groups declared that risk assessment instruments should not be used pretrial.<sup>124</sup> Those same groups detail six principles that any pretrial risk assessment tool must follow “in order to ameliorate the strong dangers and risks we see in the implementation of risk assessment instruments.”<sup>125</sup>

Early evidence on the impact of risk assessment is limited, but the nascent findings are troubling. A recent study of Kentucky’s bail reforms by Megan Stevenson found that a new risk assessment tool and other policy reforms “led to only a trivial increase in pretrial release” and, simultaneously, “an uptick in failures-to-appear (FTAs) and pretrial crime; a disappointing counter to hopes that all three margins could be improved simultaneously.”<sup>126</sup>

### III. THE CHALLENGES OF PRETRIAL RISK ASSESSMENT

Despite pretrial risk assessment’s broad and enthusiastic adoption, there are significant reasons for caution. Some of these reasons are underappreciated in the public debate. Existing skepticism about the adoption of pretrial risk assessment tools centers on concerns of racial

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122. John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUM. RTS. WATCH (Jul. 17, 2017), <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform> [<https://perma.cc/V6ZH-2JLM>].

123. Letter from Over 100 Cmty. & Advocacy Grps. Across N.Y. State to Governor Cuomo (Nov. 2017), <http://bds.org/wp-content/uploads/Bail-Reform-Letter.pdf> [<https://perma.cc/A3P5-ZJAX>] (discussing bail reform in New York).

124. THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, *THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS*, (2018) [hereinafter LEADERSHIP CONFERENCE SHARED STATEMENT], <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [<https://perma.cc/DK2Q-8LY3>].

125. *Id.* at 2.

126. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. (forthcoming 2018) (manuscript at 5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3016088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088) (last visited Nov. 12, 2018).

bias and on due process inequities, both of which are substantial concerns.<sup>127</sup>

Though these debates are incredibly important, they have contributed to a lack of discussion of a more basic tension between statistical prediction and bail reform. On the one hand, to change a broken system, policymakers enact and implement policies that work to reduce the risk of rearrest and failure to appear. On the other hand, policymakers ask statistical tools to forecast those very same risks based on data from the very system under reform.<sup>128</sup> As a result, without the right conditions and policies, risk assessment tools will typically be blind to the helpful impact of the very changes that reformers seek to introduce.

In this Part, we first describe how actuarial risk assessment tools work.

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127. In particular, ProPublica's assertion that COMPAS risk assessment tool was "biased against blacks" stimulated much of this research. See Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/2C6W-5978>]. COMPAS's creator claims that their risk assessment tool is fair because it maintains "predictive parity"—meaning that defendants with the same risk score are equally likely to reoffend. For example, in Broward County, Florida, 60% of white and 61% of black defendants assigned a risk score of seven actually reoffended. See WILLIAM DIETERICH ET AL., NORTHPOINTE INC. RESEARCH DEP'T, COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY (2016), [http://go.volarisgroup.com/rs/430-MBX-989/images/ProPublica\\_Commentary\\_Final\\_070616.pdf](http://go.volarisgroup.com/rs/430-MBX-989/images/ProPublica_Commentary_Final_070616.pdf) [<https://perma.cc/A6X6-W4D2>]. However, among defendants who ultimately did not reoffend, black defendants were twice as likely as white defendants to receive a medium or high risk score. Further, white defendants who subsequently reoffended had lower average risk scores than their black counterparts. Essentially, black defendants were over-classified as risky and unnecessarily subjected to harsher scrutiny. See Julia Angwin et al., *ProPublica Responds to Company's Critique of Machine Bias Story*, PROPUBLICA (Jul 29, 2016), <https://www.propublica.org/article/propublica-responds-to-companys-critique-of-machine-bias-story> [<https://perma.cc/JK4Z-D6YW>]. The lesson of the ProPublica piece, however, is that this result is inevitable. Where there is a divergent base rate (on average, black defendants recidivate at higher rates) and predictive tools like COMPAS must maintain predictive parity (to pass statistical muster), a predictive algorithm cannot satisfy both fairness criteria (predictive parity and equalized false positive and negative rates) simultaneously. See Jon Kleinberg et al., *Inherent Trade-Offs in the Fair Determination of Risk Scores*, ARXIV (Nov. 17, 2016), <https://arxiv.org/pdf/1609.05807.pdf> [<https://perma.cc/75NX-7PL9>]. COMPAS is also at the center of another debate: due process. In *Loomis v. Wisconsin*, 881 N.W.2d 749 (Wis. 2016), *cert. denied*, 582 U.S. \_\_\_, 137 S. Ct. 2290 (2017) (mem.), the question presented by the petitioner, Eric Loomis, was whether or not "it [is] a violation of a defendant's constitutional right to due process for a trial court to rely on [proprietary] risk assessment results at sentencing: (a) because the proprietary nature of COMPAS prevents a defendant from challenging the accuracy and scientific validity of the risk assessment; and (b) because COMPAS assessments take gender and race into account in formulating the risk assessment?" Petition for Writ of Certiorari at i, *Loomis*, 137 S. Ct. 2290 (No. 16-6387).

128. See Gil Rothschild-Elyassi, Johann Koehler & Jonathan Simon, *Actuarial Justice*, in THE HANDBOOK OF SOCIAL CONTROL (Mathieu Deflem ed., 2019) 194–206; see also *id.* at 203 (noting, along similar lines, a "special twist to actuarial justice's legitimacy puzzle: the very system that produced an outcome as illegitimate as mass incarceration must simultaneously be treated as legitimate in producing the data on which actuarial justice-based reform efforts must rely").

Section III.B illustrates how current pretrial risk assessment tools will likely make “zombie predictions,” where old data, reflecting outdated bail practices, are newly reanimated. To do so, the Article focuses specifically on two popular strains of reform: creating or expanding pretrial services and limiting or eliminating cash bail—describing in turn why those reforms are likely to significantly change the risks that risk assessment tools seek to forecast.

Section III.C examines the underappreciated role of decision-making frameworks, and the risks associated with their creation. These are matrices, akin to bail schedules, that attach a proposed course of action for a judge to a risk assessment score. When defendants are systematically regarded as riskier than they truly are, today’s decision-making frameworks may unnecessarily subject defendants to overly burdensome, and perhaps counterproductive, conditions of release. As a result, risk assessment tools and the accompanying decision-making frameworks may actually erode the benefits of risk-reducing bail reforms.

Finally, section III.D explores the long-term dangers that pretrial risk assessment tools pose to bail reform and pretrial jurisprudence more generally. Pretrial risk assessment tools may further legitimize and expand preventive detention. As a result, there is good reason to reexamine whether *United States v. Salerno* was rightly decided. Even assuming that *Salerno* was properly decided, the case nevertheless left open significant questions that will have to be resolved—questions that the widespread adoption of pretrial risk assessment make all the more urgent.

#### A. *How Pretrial Risk Assessment Works*

Typically, risk assessment tools use data about groups of people, like those who have been arrested or convicted, to assess the probability of future behavior. The creator of an actuarial tool may test hundreds of variables, like a previous failure to appear or age at current arrest, to determine which factors when weighed together are most predictive of rearrest and failure to appear.

Although these tools are frequently drawn into broader debates about machine learning or artificial intelligence,<sup>129</sup> they typically rely on

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129. See, e.g., CHELSEA BARABAS ET AL., INTERVENTIONS OVER PREDICTIONS: REFRAMING THE ETHICAL DEBATE FOR ACTUARIAL RISK ASSESSMENT 4 (2017) (“Notwithstanding the popular discourse on the ethical use of risk assessments, the vast majority of these tools do not use new statistical methods frequently associated with ‘artificial intelligence,’ such as machine learning. They are overwhelmingly based on regression models.”).

longer-established statistical methods, like regression analysis.<sup>130</sup> Often the fact or manner of their use is new, rather than the techniques employed in their creation.<sup>131</sup>

Tools vary in the kind and numbers of factors they use. Each included factor gets a weighting that reflects how strongly it correlates with rearrest or failure to appear.<sup>132</sup> For example, historical data might show that defendants who are under the age of thirty when arrested are much more likely to be rearrested or fail to appear, compared to defendants who are over thirty at the time of arrest.<sup>133</sup> Accordingly, if person is under the age of thirty when arrested, that person might be assigned three points. Conversely, a person over thirty might be assigned a single point. The greater the numerical value, the more that variable is correlated with worse outcomes.<sup>134</sup>

When completing a risk assessment, either a human, a computer, or some mix of the two will determine the applicable variables and calculate the total risk score. Those risk scores are then transformed into risk categories or scales. For example, a tool might sort defendants into “low risk,” “moderate risk,” “high risk.”

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130. *Id.* at 3–4 (“Regression modeling is particularly well-suited for prediction oriented assessment, because it enables researchers to identify variables that are predictive of an outcome of interest, without necessarily having to understand why that factor is significant.”); *id.* (“Regression analysis is widely used for purposes of forecasting future events. The main goal of regression is to identify a set of variables that are predictive of a given outcome variable. This is achieved by determining the optimal weights for a given set of covariates, ones that are best predictive of the outcome variable of interest. This is done through processes called model checking and selection, whereby statistical tests are run on each covariate to see how significantly predictive they are of the outcome variable.”).

131. There is a thriving debate about how and where the recent growth of machine learning methods (sometimes broadly termed “AI”) should stimulate changes to legal doctrine or public administration. Most of those questions are not (yet) presented in the pretrial context. It is unclear whether these newer technologies should really be seen by the law as something significantly new or different. *See, e.g.,* Richard Berk & Justin Bleich, *Statistical Procedures for Forecasting Criminal Behavior: A Comparative Assessment*, 12 CRIM. & PUB. POL’Y 513 (2013) (arguing that, after comparing various methods, “[f]here seems to be no reason for continuing to rely on traditional forecasting tools such as logistic regression”); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147 (2017); Paul Ohm & David Lehr, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653–717 (2017).

132. *See generally* CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT (2011).

133. *See, e.g.,* PRETRIAL JUSTICE INST. & JFA INST., THE COLORADO PRETRIAL ASSESSMENT TOOL 16 (2012), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=64908e23-bf3e-9379-1a1f-f2d5b9e1702f&forceDialog=0> [<https://perma.cc/64BL-NUF2>].

134. *See, e.g.,* Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 39 (2011).

The Colorado Pretrial Assessment Tool (CPAT) offers an accessible example.<sup>135</sup>

**Table 1:**  
**Risk Scores and Relevant Statistics**<sup>136</sup>

<b>Revised Risk Category</b>	<b>Risk Score</b>	<b>Public Safety Rate</b>	<b>Court Appearance Rate</b>	<b>Overall Combined Success Rate</b>
<b>1</b>	0–17	91%	95%	87%
<b>2</b>	18–37	80%	85%	71%
<b>3</b>	38–50	69%	77%	58%
<b>4</b>	51–82	58%	51%	33%
<b>Average</b>	30	78%	82%	68%

In the above example, risk scores are sorted into four categories. Those categories represent the rate of rearrest and/or failure to appear. For example, a defendant who has a score of 39 falls into Category 3. Placement into that category means that, as a group, defendants assessed as similar to the current defendant were rearrested 31% of the time and failed to appear 23% of the time.<sup>137</sup>

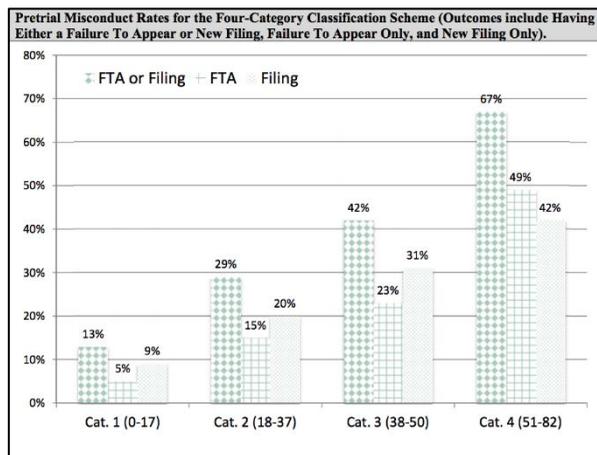
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135. PRETRIAL JUSTICE INST. & JFA INST., *supra* note 133, at 18 tbl.2.

136. *Id.* at 18.

137. *Id.* at 15 fig.2.

**Figure 1:**  
**Pretrial Misconduct Rates**<sup>138</sup>



### B. *Zombie Predictions*

Pretrial risk assessment tools developed on data that does not reflect changing ground realities as a result of risk-mitigating reforms will likely make “zombie predictions.”<sup>139</sup> That is, the predictions of such a pretrial risk assessment tool may reanimate and give new life to old data and outcomes from a bail system that is presently under reform. Below, we detail the intersection between two common bail reforms, expanding pretrial services and cabining money bail, and zombie predictions. We finish by examining how such zombie predictions might actually dampen the otherwise positive effects of risk-mitigating policy reforms.

Our criticism of zombie predictions should not be read as a general criticism of prediction. Predictions are always based on historical data, which, by definition, come from the past. But prediction at bail is problematic because the training data often come from times and places that are materially different from the ones where the predictions are being made, and few actors continuously update tools with new facts.

138. *Id.* at 15.

139. We use the term “zombie” here, not in the Oxford English Dictionary’s first-listed sense of “a soulless corpse said to have been revived by witchcraft,” but rather in the extended sense indicated in the December 14, 2016 online update to the OED’s Third Edition—now listed as the “most common sense” of the term—a “similar[ly] mindless creature.” OXFORD ENG. DICTIONARY ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/232982#eid13494009> (last visited Feb. 10, 2018). We choose this evocative term and its negative connotations intentionally.

Responsible, fully informed prediction, where outcomes are tracked and models refined and updated, is not susceptible to this objection.

*1. Today's Predictions Follow Yesterday's Patterns*

Using one jurisdiction's data to predict outcomes in another is an inherently hazardous exercise, a challenge that is highlighted in the existing literature. When a risk assessment tool's developmental sample does not reflect local conditions, it might not accurately classify risk.<sup>140</sup> Geographic differences in law enforcement patterns, for example, can undermine tools' accuracy. The factors that bring individuals into contact with the criminal justice system in one jurisdiction or country may not be the same as those for offenders in a different jurisdiction or country. Local differences in correctional resources can also make a substantial difference in predictive efficacy. In writing about risk assessment in the neighboring context of criminal sentencing, John Monahan and Jennifer Skeem note that “[v]ariables that predict recidivism in a jurisdiction with ample services for offenders may not predict recidivism in a resource-poor jurisdiction.”<sup>141</sup>

Take the Level of Service (LS) family of assessment instruments as an example. The LS tools are some of the most widely used risk and needs assessment tools in correctional settings.<sup>142</sup> Notably, the tools were developed based on the histories of *Canadian* offenders.<sup>143</sup> The creators of those instruments found “high predictive validity” in their published validation studies.<sup>144</sup> But the “predictive performance results reported by [other assessors] . . . , especially those outside Canada, have not been as favorable.”<sup>145</sup> One meta-analysis of LS-instruments found that their predictive capacity was significantly *worse* for U.S. offenders, compared to their performance for Canadian and other offenders.<sup>146</sup>

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140. See, e.g., Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L. REV. 1, 33–39 (2015).

141. John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489, 500 (2016).

142. Grant Duwe & Michael Rocque, *Effects of Automating Recidivism Risk Assessment on Reliability, Predictive Validity, and Return on Investment (ROI)*, 16 CRIM. & PUB. POL'Y 235, 239 (2017).

143. *Id.* at 240 (“[These tools were] [d]eveloped on samples of Canadian offenders by the creators of the RNR approach . . .”).

144. *Id.*

145. *Id.* at 239.

146. See MARK E. OLVER ET AL., *Thirty Years of Research on the Level of Service Scales: A Metaanalytic Examination of Predictive Accuracy and Sources of Variability*, 26 PSYCHOL. ASSESSMENT. 156, 166 tbl.9 (2014).

The same problem could easily apply not only across geography, but also across time. Underlying conditions, like economic growth and development, can change across time and lead to different results for various reasons.<sup>147</sup>

Overall, problems arise when the group being assessed “is not similar to the developmental sample, [or] the developmental sample is not a representative reference for the individual to be assessed.”<sup>148</sup> Just as a pretrial resource-poor jurisdiction in Wyoming differs in significant ways from a pretrial resource-rich jurisdiction in California, so too does a single jurisdiction when it significantly changes its bail system. Simply put, risk-mitigating policies will likely *change the risks* a defendant faces upon release, just like a change in economic conditions or in time can. Overall, using historic, pre-reform outcome data to predict future risks within a jurisdiction that significantly reforms its bail system deserves heightened, continued scrutiny.<sup>149</sup>

The challenge of time-based changes in risk applies equally to jurisdictions that develop their own pretrial risk assessment tool from scratch, and those that validate a tool developed elsewhere. For tools to make well-calibrated predictions from the start, they need to be trained on data that matches the conditions about which they are making predictions.

There is strong reason to believe that the data used to build today’s risk assessment tools do not match the reality into which the tools are deployed. As we detailed in section II.C, jurisdictions across the country are pursuing reforms aimed at transforming a defendant’s odds of success upon release. But today’s risk assessment tools are not designed to incorporate the effects of those reforms.

For example, consider the publicly available information about the Public Safety Assessment (PSA) and Correctional Offender

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147. For example, one can imagine that a jurisdiction that experiences substantial and equitable economic growth might see rearrest and failure to appear rates decline, given a better overall economic environment.

148. Hamilton, *supra* note 140, at 37.

149. In many ways, proposals for periodic, localized revalidation of risk assessment tools are similar to our argument. For example, in the criminal sentencing context, Monahan and Skeem argue that “[u]nless a tool is validated in a local system—and then periodically revalidated—there is little assurance that it works.” Monahan & Skeem, *supra* note 141, at 500. These proposals capture a sense that, within a jurisdiction, outcomes can change and that it is important for policymakers to track those changes. Our argument effectively extends and further underscores this conceptual point: thanks in part to the reforms that brought many risk assessment tools into existence, outcomes within jurisdictions are already changing. The need for what Monahan and Skeem call for in the sentencing context is heightened in the pretrial context, where the ground truth of rearrest and failure to appear rates may be significantly mitigated by other pretrial policies.

Management Profiling for Alternative Sanctions (COMPAS) were each developed on multi-jurisdiction data. PSA, an instrument developed by the Laura and John Arnold Foundation, is based on nearly 750,000 cases drawn from more than 300 jurisdictions.<sup>150</sup> Similarly, COMPAS was initially developed on a sample of 30,000 survey responses, administered to prison and jail inmates, probationers, and parolees across the country, between January 2004 and November 2005.<sup>151</sup> In all likelihood, there will be some degree of a mismatch between jurisdictions from which PSA and COMPAS drew their sample and those jurisdictions in which the tools were deployed.

Pretrial risk assessment tools that are developed locally typically rely upon smaller samples of data, often dating from before significant reform efforts began. For example, the Florida Pretrial Risk Assessment instrument was developed on 1,757 cases across six counties, from January to March 2011.<sup>152</sup> The Ohio Risk Assessment System's Pretrial Assessment Tool was developed on "over 1,800" cases, from September 2006 to October 2007.<sup>153</sup> The Virginia Pretrial Risk Assessment Instrument was originally developed on a sample of 1,971 cases between July 1, 1998 to June 30, 1999,<sup>154</sup> though it was later revised based on data from 2005.<sup>155</sup>

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150. LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 3 (2013), [https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf) [https://perma.cc/945R-UWVD]. Notably, documents recently released in response to public records requests note that the development data for the tool came from state court systems in Colorado, Connecticut, Florida, Kentucky, Maine, Ohio, and Virginia, the District of Columbia, and the federal pretrial system. See ZACH DAL PRA, JUSTICE SYS. PARTNERS, LJAF PUBLIC SAFETY ASSESSMENT - PSA 27 (2016) [https://cdn.muckrock.com/foia\\_files/2016/12/15/Volusia\\_Stakeholder\\_Training\\_10162015.pdf](https://cdn.muckrock.com/foia_files/2016/12/15/Volusia_Stakeholder_Training_10162015.pdf) [https://perma.cc/GZWS-3NA7].

151. NORTHPOINTE, INC., PRACTITIONER'S GUIDE TO COMPAS CORE 11 (2015) ("The Composite Norm Group consists of assessments from state prisons and parole agencies (33.8%); jails (13.6%); and probation agencies (52.6%)."), [http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-\\_031915.pdf](http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-_031915.pdf) [https://perma.cc/RK2U-CPAR]. Agencies using COMPAS Core can select the default norm group, or a more specific subgroup, like "male jail" or "male prison/parole" or "female jail." *Id.* at 11.

152. JAMES AUSTIN ET AL., FLORIDA PRETRIAL RISK ASSESSMENT INSTRUMENT 3-4 (2012), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=58add716-5e41-eba3-0a3d-f9298f7e1a54> [https://perma.cc/2HSS-LJAT].

153. Edward J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 FED. PROB. 21 (2010).

154. MARIE VANNOSTRAND, PRETRIAL RISK ASSESSMENT IN VIRGINIA 10 (2009), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-report.pdf> [https://perma.cc/A3ZH-G7UB].

155. MARIE VANNOSTRAND, VA. DEP'T OF CRIMINAL JUSTICE SERVS., ASSESSING RISK AMONG PRETRIAL DEFENDANTS IN VIRGINIA: THE VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT 4

Even where bail reform legislation simultaneously introduces broad pretrial reforms and risk assessment, the developers tasked with building such a tool still have to look *backwards* for their examples.<sup>156</sup> In fact, the incentives to look further back in history can be strong. A larger, more diverse dataset from which to draw a sample is less likely to contain random statistical artifacts that could skew the results. But, in the bail context, doing so will also mean a deeper reliance on data that represents the historic risks of release, rather than the current ones.

Take Colorado as an example. A revised version of the Colorado Pretrial Assessment Tool (CPAT) was released in October 2012.<sup>157</sup> But Colorado's sweeping new bail reform was not signed into law until May 2013.<sup>158</sup> Thus, in Colorado, we would expect to see zombie-style predictions that overstate defendants' true levels of risk.

The available data suggest that this may indeed have happened. Below, we reproduce figures from *The Colorado Bail Book: A Defense Practitioner's Guide To Adult Pretrial Release*.<sup>159</sup>

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(2003), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/assessing-risk-among-pretrial-defendants-virginia-virginia-pretrial-risk-assessment-instrument.pdf> [<https://perma.cc/H47M-YAQQ>].

156. Notably, smaller jurisdictions (aside from likely having fewer resources to dedicate to pretrial systems) might have fewer examples to create a locally-developed tool and thus have an even greater incentive to look farther back.

157. PRETRIAL JUSTICE INST. & JFA INST., *supra* note 133.

158. Act of May 11, 2013, ch. 202, 2013 Colo. Sess. Laws 820.

159. COLO. CRIMINAL DEFENSE INST., COLO. STATE PUB. DEFENDER & NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS (NACDL), *THE COLORADO BAIL BOOK: A DEFENSE PRACTITIONER'S GUIDE TO ADULT PRETRIAL RELEASE* 51 app. 3 (2015).

**Table 2:**  
**CPAT Risk Level Research Projections Compared to Denver**  
**County Actuals<sup>160</sup>**

	CPAT 1	CPAT 2	CPAT 3	CPAT 4
<b>CPAT Projected</b>	20%	49%	23%	8%
<b>Denver 2012</b>	12%	39%	27%	22%
<b>Denver 2013</b>	11%	38%	28%	23%
<b>Denver 2014</b>	13%	39%	38%	20%
<b>Avg. Diff.</b>	- 8%	- 10.33. . .%	+ 8%	+ 13.66. . .%

Here, the number of defendants who the tool's designers *expected* to be classified as CPAT 3 or CPAT 4—the higher risk categories—is compared to the number of defendants who were *actually* classified as CPAT 3 or CPAT 4. The gap is noticeable. Based on their training data, the tool's designers suggested that about a third of defendants would be classified as higher risk. But, for each year of data in Denver, essentially *half* of all defendants were assessed as higher risk. Based on the available data, it's unclear why this is the case.<sup>161</sup>

Simply classifying more defendants as high risk offers little insight. The other side of the coin is, how did defendants who were classified as higher risk perform?

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160. *Id.*

161. One might suspect that defendants from Denver are higher risk than other Coloradans and were not included, or were not heavily weighted, in the development sample of CPAT. In fact, defendants from Denver actually represented 13% of CPAT's development sample. PRETRIAL JUSTICE INST. & JFA INST., *supra* note 133, at 9.

**Table 3:**  
**Failure to Appear Rates Across CPAT Risk Category in Denver**<sup>162</sup>

	<b>CPAT 1</b>	<b>CPAT 2</b>	<b>CPAT 3</b>	<b>CPAT 4</b>
<b>CPAT Projected</b>	5%	15%	23%	49%
<b>2013 Denver Actual</b>	7%	11%	16%	20%
<b>2014 Denver Actual</b>	5%	14%	16%	23%
<b>Avg. Diff</b>	+ 1%	- 2.5%	- 7%	- 27.5%

**Table 4:**  
**Failure to Appear Rates Across CPAT Risk Category in Mesa**<sup>163</sup>

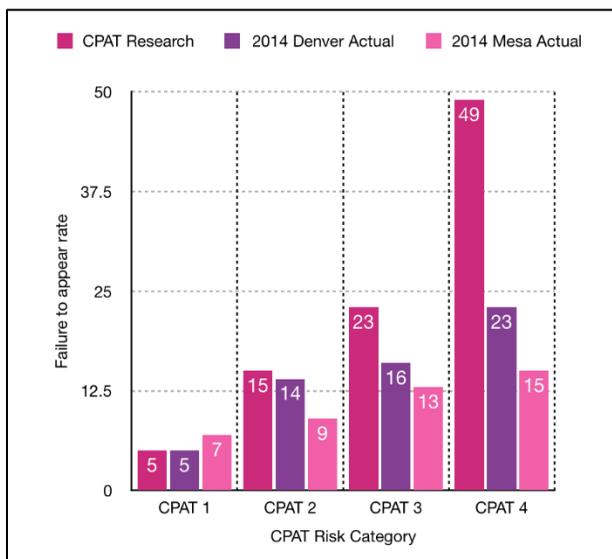
	<b>CPAT 1</b>	<b>CPAT 2</b>	<b>CPAT 3</b>	<b>CPAT 4</b>
<b>CPAT Projected</b>	5%	15%	23%	49%
<b>2014 Mesa Actual</b>	7%	9%	13%	15%
<b>Avg. Diff</b>	+ 2%	- 6%	- 10%	- 34%

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162. *Id.*

163. *Id.*

**Figure 2:**  
(Drawn from Tables 3 and 4)



**Table 5:**  
New Criminal Offense Rates Across CPAT Category in Denver<sup>164</sup>

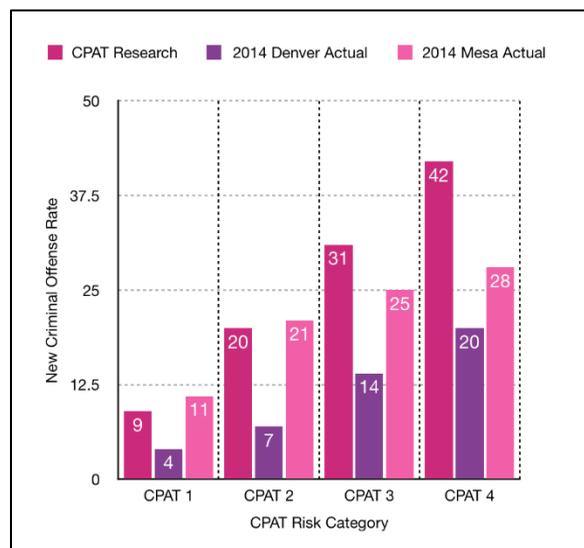
	CPAT 1	CPAT 2	CPAT 3	CPAT 4
<b>CPAT Projected</b>	9%	20%	31%	42%
<b>2013 Denver Actual</b>	3%	8%	15%	18%
<b>2014 Denver Actual</b>	4%	7%	14%	20%
<b>Avg. Diff</b>	- 5.5%	- 12.5%	- 16.5%	- 23%

164. *Id.*

**Table 6:**  
**New Criminal Offense Rates Across CPAT Category in Mesa<sup>165</sup>**

	CPAT 1	CPAT 2	CPAT 3	CPAT 4
<b>CPAT Projected</b>	9%	20%	31%	42%
<b>2014 Mesa Actual</b>	11%	21%	25%	28%
<b>Avg. Diff</b>	+ 2%	+ 1%	- 6%	- 14%

**Figure 3:**  
**(Drawn from Tables 5 and 6)**



We find similar evidence in efforts to develop and validate the Public Safety Assessment.<sup>166</sup> The rate of failures to appear in the PSA's developmental sample<sup>167</sup> diverged from the rate of failures to appear in

165. *Id.*

166. DAL PRA, *supra* note 150, at 31–32, 46–47.

167. The developmental sample for PSA came from jurisdictions in Colorado, Connecticut, Florida, Kentucky, Ohio, Maine, Virginia, Washington D.C. and the Federal Pretrial Services. See LAURA & JOHN ARNOLD FOUND., CRIMINAL JUSTICE DATA USED TO DEVELOP THE PUBLIC SAFETY ASSESSMENT, <http://www.arnoldfoundation.org/wp-content/uploads/Criminal-Justice-Data-Used-to-Develop-the-Public-Safety-Assessment-Final.pdf> [<https://perma.cc/Q3ZE-YRZ5>].

jurisdictions where PSA was subsequently validated.<sup>168</sup> As Table 6 demonstrates for the top four risk grades—that is defendants receiving FTA scores of 3, 4, 5, and 6—defendants on whom the PSA was actually used (that is, those in the validation sample) succeeded more often than their counterparts in the developmental sample. We see less of this phenomenon with respect to “new criminal activity” rates in Table 7. Nevertheless, it appears that defendants who are assessed as higher risk, in reality, present a lower risk than expected upon release.

**Table 7:**  
**Failure to Appear Rates Across PSA FTA Categories<sup>169</sup>**

	<b>FTA 1</b>	<b>FTA 2</b>	<b>FTA 3</b>	<b>FTA 4</b>	<b>FTA 5</b>	<b>FTA 6</b>
<b>PSA Developmental Sample</b>	10%	15%	20%	31%	35%	40%
<b>PSA Validation</b>	12%	16%	18%	23%	27%	30%
<b>Avg. Diff.</b>	+ 2%	+ 1%	- 2%	- 8%	- 8%	- 10%

**Table 8:**  
**New Criminal Activity Rates Across PSA NCA Categories<sup>170</sup>**

	<b>NCA 1</b>	<b>NCA 2</b>	<b>NCA 3</b>	<b>NCA 4</b>	<b>NCA 5</b>	<b>NCA 6</b>
<b>PSA Developmental Sample</b>	10%	15%	23%	30%	48%	55%
<b>PSA Validation</b>	9%	15%	21%	34%	43%	52%
<b>Avg. Diff.</b>	- 2%	+ 0%	- 2%	+ 4%	- 5%	- 3%

This is the stark, unfortunate irony at the heart of today’s bail reform: today’s pretrial risk assessment tools reflect and reinforce the very patterns of failure to appear that new, innovative policies work to

168. DAL PRA, *supra* note 150, at 31, 46.

169. *Id.*

170. *Id.*

change. Below, we consider specifically how these other policy changes may be shaping changes in failure to appear and rearrest risk.

2. *Expanded Pretrial Services Will Change the True Risk of Failure to Appear*

Small changes in the administration of bail can have a substantial impact on failure to appear rates in a jurisdiction. Many of these reforms are relatively low-cost and low-tech, such as text message reminders about upcoming court dates. Creating pretrial service agencies in jurisdictions that do not already have them, and expanding funding for those agencies already in place, will likely further curb the incidence of failures to appear.<sup>171</sup> Of course, a given intervention may reduce failure to appear more in one population than another. For example, low-income defendants, who may lack stable housing, might disproportionately benefit from text message reminders, as opposed to physical postcards sent by mail.

“Failure to appear” often reflects factors far more prosaic than a defendant absconding from the jurisdiction. As a 2001 National Institute of Justice report noted, when “released defendants miss a court appearance, it is often not because they are fleeing from prosecution but, rather, for other reasons ranging from genuine lack of knowledge about the scheduled date to forgetfulness.”<sup>172</sup>

What causes such non-flight failures to appear? Considering the available data for similarly charged defendants who are unable to meet financial conditions of release, it is likely that financial needs play a prominent role for those who do obtain release. People with jobs that have inflexible hours, or that require a significant commute, might find it difficult or impractical to miss work for a court date. A defendant might also fail to appear because they simply forget about an upcoming court appearance. They may be afraid or have insufficient information about how to get to court, what to do once there, and what will happen next.

Some observers emphasize the slow pace of justice, arguing that “the typically long period of time between the citation and the court date

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171. *See, e.g.*, MARIE VANNOSTRAND, KENNETH J. ROSE & KIMBERLY WEIBRECHT, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION (2011); NAT’L ASSOC. OF PRETRIAL SERVS. AGENCIES, STANDARDS ON PRETRIAL RELEASE 15 (3d ed. 2004) (“Pretrial programs are a vitally important part of [a criminal justice system] because they perform functions that, in their absence, are often performed inadequately or not at all.”).

172. BARRY MAHONEY ET AL., U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 38 (2001).

naturally leads to [failures to appear] due to the relative instability of many defendants.”<sup>173</sup> One study found that the amount of time between a defendant’s release and the disposition of her case was the most important factor in predicting failures to appear.<sup>174</sup> Others argue that defendants are often “unaware that failing to show up for court can lead to an arrest warrant for seemingly minor violations of the law.”<sup>175</sup> Still others counter that deliberate refusals to appear in court are commonplace. These are the risks that reforms are motivated to mitigate.<sup>176</sup>

A series of studies suggests that reminders, alone, may make a major difference. For example, administrators in Jefferson County, Colorado implemented live-caller reminders where, if the caller “successfully contacted a defendant, she read a script (in either English or Spanish) reminding the defendant of the court date, giving directions to the court, and warning the defendant of the consequences of failing to appear for court.”<sup>177</sup> The results of the program were described as “exceptional.”<sup>178</sup> In 2010, “the court-appearance rate for defendants who were successfully contacted was 91%, compared to an appearance rate of 71% for those who were not.”<sup>179</sup>

A study in fourteen counties across Nebraska found that postcard reminders significantly reduced failure to appear rates.<sup>180</sup> The study examined three different types of postcard reminders (all in English/Spanish): one reminder-only postcard with just a notification,

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173. Timothy R. Schnacke, Michael R. Jones & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV. 86, 87 (2012).

174. STEVENS H. CLARKE, JEAN L. FREEMAN & GARY KOCH, *THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL* 34 (1976).

175. Schnacke, Jones & Wilderman, *supra* note 173, at 87.

176. PRETRIAL JUSTICE CTR. FOR COURTS, *USE OF COURT DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES I* (2017) (“Several jurisdictions across the country have adopted a court date reminder process (or court date notification system) to improve court appearance rates, such as in Coconino County (AZ), Jefferson County (CO), Lafayette Parish (LA), Reno (NV), New York City (NY), Multnomah and Yamhill Counties (OR), Philadelphia (PA), King County (WA), and the states of Arizona, Kentucky, and Nebraska. Recently, Judge Timothy C. Evans, Chief Judge of the Cook County Circuit Court in Illinois, issued an order requiring the county to implement a pretrial notification system by December 1, 2017.”).

177. Schnacke, Jones & Wilderman, *supra* note 173, at 91.

178. *Id.* at 92.

179. *Id.*

180. Alan Tomkins et al, *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 CT. REV. 96, 100 (2012).

one reminder postcard that included the threat of sanctions for failure to appear, and one that included both the threat of sanctions and other elements of procedural justice.<sup>181</sup> All led to significant reduction in failures to appear.<sup>182</sup>

Other initiatives look to capitalize on SMS text messages as a reminder. For example, the Court Messaging Project—an open-source initiative from Stanford’s Legal Design Lab—works to “to make the court system more navigable and to improve people’s sense of procedural justice—that the legal system is fair, comprehensible, and user-friendly.”<sup>183</sup> In New York City, a recent experiment found that simple text reminders reduced failures to appear by 21%, while those with more information led to a 26% drop.<sup>184</sup> Uptrust, a company “which sends text message reminders to attend court and other obligations” claims it can reduce failure to appear rates by 75%.<sup>185</sup>

Other reforms might reduce a defendant’s flight risk, too. For example, electronic monitoring—a contentious, highly invasive condition of release—already has a long history of pretrial use, and may deter defendants from fleeing.<sup>186</sup> But unlike reminders—whose effectiveness is documented in a wide range of studies—the efficacy of GPS monitoring for reducing flight from the jurisdiction remains an open question.<sup>187</sup> But it is certainly plausible to imagine that electronic monitoring would effectively deter some accused people who might flee from actually fleeing. If so, such an intervention would further reduce the risk of pretrial failure, compared with historical outcomes.<sup>188</sup>

But consider New York City. At a recent public event, the City’s Criminal Justice Agency announced that it would be developing a new

181. *Id.*

182. *Id.* at 98–100.

183. *The Court Messaging Project*, STAN. LEGAL DESIGN LAB, <http://www.legaltechdesign.com/CourtMessagingProject/> [https://perma.cc/GJ82-K3QQ].

184. BRICE COOKE ET AL., USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 16 (2018), [https://urbanlabs.uchicago.edu/attachments/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/142-954\\_NYCSummonsPaper\\_Final\\_Mar2018.pdf](https://urbanlabs.uchicago.edu/attachments/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/142-954_NYCSummonsPaper_Final_Mar2018.pdf) [https://perma.cc/MRG8-RBZ8].

185. *What We Do - Our Results*, UPTRUST, <http://www.uptrust.co/what-we-do#our-results-section> [https://perma.cc/GJ82-K3QQ].

186. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1365 (2014).

187. *Id.* at 1368–69. Most focus on post-conviction proceedings, though a few studies have examined the effectiveness at pretrial (albeit with small sample sizes).

188. Though, as we noted, the incidence of flight from a jurisdiction in 2017 is probably minimal.

risk assessment tool, based on seven years of criminal justice data.<sup>189</sup> According to the announcement, source data for the new model would come from 2009–2015.<sup>190</sup> But the City’s arrest practices during that period have been held unconstitutional,<sup>191</sup> and therefore *are not and should not be a reliable guide*, legally or statistically, to who will be arrested in the future. That is particularly true for the very groups of people, like young men of color, who were disproportionately stopped, questioned, and frisked during this period of time.<sup>192</sup>

Complicating matters even further, the City only recently began an expansive supervised release program in March 2016.<sup>193</sup> Earlier release programs were only pilot programs in select areas. Thus, as it is currently envisioned, New York City’s new risk assessment tool will base its predictions primarily on the outcomes of unsupervised release, even though it is being deployed in a setting where more releases can be supervised. As a result, more defendants might be classified as a high risk of failure to appear simply because the new model does not reflect their greater likelihood of reappearance thanks to supervision. At the margin, this would likely lead some defendants who could succeed on release (indeed, some of the very ones who could be most helped by the new program) to be jailed instead. In addition, the City recently began sending text message reminders to all accused people for whom it has a mobile number, building on a successful trial deployment.<sup>194</sup>

Of course, New York City is just a microcosm. Today’s suite of pretrial risk assessment tools were largely “trained” on populations that did not receive the benefit of newly-enacted, risk-mitigating reforms.<sup>195</sup>

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189. Dr. Richard Peterson, Research Director, N.Y.C. Criminal Justice Agency, Address at Measuring Justice: Redesigning New York City’s Pretrial Risk Assessment and Recommendation System (Sept. 18, 2017).

190. *Id.*; N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2016, at 2 (2018), <https://www.nycja.org/measuring-justice-panel/> (last visited Nov. 12, 2018).

191. See *Floyd v. City of New York*, 959 F. Supp. 540, 667 (S.D.N.Y. 2013).

192. See *Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/B94T-2KR2>] (observing that in 2009–2015 blacks and Latinos represented more than 80% of stops).

193. CINDY REDCROSS, MELANIE SKEMER, DANNIA GUZMAN, INSHA RAHMAN & JESSI LACHANCE, NEW YORK CITY’S PRETRIAL SUPERVISED RELEASE PROGRAM: AN ALTERNATIVE TO BAIL 4 (2017), <https://www.mdrc.org/sites/default/files/SupervisedRelease%20Brief%202017.pdf> [<https://perma.cc/2GQ3-XRWV>].

194. See *New Text Message Reminders for Summons Recipients Improves Attendance in Court and Dramatically Cuts Warrants*, N.Y.C., <http://www1.nyc.gov/office-of-the-mayor/news/058-18/new-text-message-reminders-summons-recipients-improves-attendance-court-dramatically> [<https://perma.cc/4GCZ-8VT6>].

195. Despite studies and pilot projects demonstrating the success of live-caller reminders, postcard reminders, and other reminders in helping reduce the number of failures to appear, the

As a result, the question that today's tools answer is, "how likely is this defendant to return to court on schedule *without* being reminded to appear?" The tools do not measure, because the historical data does not and cannot reflect, the greater chance that some defendants will reappear after being reminded.

### 3. *Replacing or Cabining Money Bail Could Reduce the True Risk of Rearrest for Those Released*

Transformative bail reforms that reduce or altogether eliminate money bail—if they lead, as expected, to many more releases on recognizance—are likely to reduce the risk of pretrial rearrest. As detailed above,<sup>196</sup> research demonstrates that pretrial detention itself actually increases risk of pretrial rearrest once a defendant is released. And current statistics clearly show that money bail is the main reason defendants spend any significant amount of time in jail pretrial.<sup>197</sup>

Accordingly, policies that would reduce or eliminate money bail, and release those who would otherwise be held on small bail amounts, are likely to have a significant effect. Such policies would likely reduce the number of people who spend any time in jail pretrial. As a result, released defendants will likely face a lower risk of rearrest following their immediate release from custody. In short, by reducing the incidence of pretrial detention, jurisdictions may also reduce the overall level of rearrest risk.

Recent research lends support to this hypothesis.<sup>198</sup> Professors Paul Heaton, Sandra Mayson, and Megan Stevenson, find that if defendants in Harris County, Texas who were assigned the lowest amount of cash bail (\$500) had simply been released instead, the county would have released 40,000 *more* defendants pretrial between 2008 and 2013.<sup>199</sup> They further find that if those defendants had been directly released (and

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majority of pretrial service agencies have not adopted these relatively low-tech techniques. For example, the findings from a 2009 Pretrial Justice Institute survey for pretrial service programs found that from 1989 to 2009, the percentage of programs that called the defendant before a scheduled court date declined from over 40% in 1989 to 30% in 2009. In 2009, about 5% of programs used an automated dialing system to call and remind the defendant. The percentage of programs that produced a manually generated reminder letter in 1989 was just under 40%, but in 2009 was about 4%, while about 17% used automatically generated reminder letters. Almost 10% of surveyed pretrial service agencies had no court date reminder procedures at all. *See* PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 50 (2009).

196. *See supra* section III.B.3.

197. *See* Heaton, Mayson & Stevenson, *supra* note 94.

198. *Id.*

199. *Id.* at 787.

did not spend any time in jail at all between arraignment and trial), these defendants as a group would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors than they ultimately did after their eventual, later releases.<sup>200</sup> They find that pretrial detention increases the share of defendants charged with new misdemeanors by more than 13% thirty days post-bail hearing, and increases the share of defendants charged with new felonies by more than 30% within one-year post-bail hearing.<sup>201</sup>

If Harris County abandoned their bail schedule in favor of a presumption of release on personal recognizance, the effect could be significant.<sup>202</sup> The incidence of pretrial detention would likely significantly decline. Such a policy would, in turn, accomplish what Heaton, Mayson, and Stevenson simulate: reduce the number of pretrial rearrests, and of rearrests post-case disposition.

Yet, a risk assessment tool developed on data that predates these reforms would not capture this new ground truth. Such a risk assessment tool would, oddly, compare post-reform defendants, who benefitted from being released immediately, to a very different group: defendants who were detained a few days or several weeks before being able to meet their financial conditions of release.

Here, the risk assessment tool would be blind to the range of possible risk-mitigating reforms and would instead look back to pre-reform outcomes to characterize the defendant's risk. Doing so will, in all likelihood, *overstate* those defendants' risk of rearrest.<sup>203</sup> And in jurisdictions where a higher risk assessment score for rearrest can lead to

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200. *Id.*

201. *Id.* at 768 tbl.8.

202. Judge Lee H. Rosenthal's April 28 injunction on Harris County's bail system effectively forces this to occur. Her order required the sheriff's office to release those charged with misdemeanors within twenty-four hours of their arrest, unless they are wanted on a detainer from other jurisdictions, on immigration proceedings, on mental health concerns, or are held family violence protection measures. Since early June, more than 2,600 defendants have been released on personal bond. See Gabrielle Banks & Mihir Zaveri, *Harris County's Bail Battle to Resume Before Fifth U.S. Circuit in October*, CHRON (Aug. 1, 2017, 12:55 PM), <https://www.chron.com/news/houston-texas/article/Harris-County-s-historic-bail-battle-to-resume-11723175.php> [<https://perma.cc/26RR-ZB8Z>].

203. As detailed above, if defendants assigned the lowest bail amounts had been directly released (and did not spend any time in jail at all between arraignment and trial), these defendants as a group would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors than they ultimately did after their eventual, later releases. Now, imagine two different risk assessment tools: one built on pre-reform data, and one built on post-reform data. In all likelihood, the post-reform risk assessment would observe significantly fewer pretrial rearrests, indicating a diminished risk of pretrial release.

presumptive pretrial detention hearing, like New Jersey,<sup>204</sup> it is possible that some poor defendants will be jailed because, historically, the jailing of people similarly situated left *those* people incredibly ill-prepared to succeed on release.

#### 4. *Zombie Predictions May Dampen the Positive Effects of Other Reforms*

Zombie predictions might perversely undermine the apparent impact of other bail reforms. A robust literature on the communication and framing of risk suggests that judges will perceive “risky” defendants as tainted, and will treat them differently.<sup>205</sup> Thus, zombie predictions may steer a sizable number of defendants away from risk-mitigating reforms and, in turn, dampen the positive effects of policy reforms. In turn, such systematic over-prediction of risk may make the ground realities in a jurisdiction seem *worse* than they truly are. That is, policymakers may see that there are *more* “risky” defendants in their jurisdiction than they might have expected. Accordingly, policymakers might second-guess their pursuit of risk-mitigating reforms and focus on more punitive, restrictive conditions of release. This potential feedback loop is subtle, and may be hard to detect, but it should nevertheless concern reformers—if they cannot champion the positive results of new policies and procedures, their endeavor may backfire.

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204. Previously, Rule 3:4A(b)(5) indicated that “The court may consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the Pretrial Services Program established pursuant to N.J.S.A. 2A:162–25 that the defendant’s release is not recommended (i.e., a determination that “release not recommended or if released, maximum conditions” (emphasis omitted)). *State v. Mercedes*, 183 A.3d 914, 922–23 (N.J. 2018). In *State v. Mercedes*, the state supreme court revised the rule to read as follows: “The standard of proof for the rebuttal of the presumption of pretrial release shall be by clear and convincing evidence. To determine whether a motion for pretrial detention should be granted, the court may take into account information about the factors listed in N.J.S.A. 2A:162–20.” *Id.* at 926. As Justice Albin noted in his concurrence, “[t]he pretrial services recommendation, through the court rule, *could have operated to undermine the rebuttable presumption favoring pretrial release.*” *Id.* at 931 (Albin, J., concurring) (emphasis added).

205. See, e.g., MORRIS E. CHAFETZ, *THE TYRANNY OF EXPERTS: BLOWING THE WHISTLE ON THE CULT OF EXPERTISE* 103 (1996); Leam A. Craig & Anthony Beech, *Best Practice in Conducting Actuarial Risk Assessments with Adult Sexual Offenders*, 15 J. SEXUAL AGGRESSION 193, 197 (2009); Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 906 (2003); Nicholas Scurich et al., *Innumeracy and Unpacking: Bridging the Nomothetic/Idiographic Divide in Violence Risk Assessment*, 36 LAW & HUM. BEHAV. 548, 548 (2012); Nicholas Scurich & Richard S. John, *The Effect of Framing Actuarial Risk Probabilities on Involuntary Civil Commitment Decisions*, 35 LAW & HUM. BEHAV. 83 (2011); Paul Slovic et al., *Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats*, 24 LAW & HUM. BEHAV. 271 (2000).

Once risk is overestimated, defendants may be subject to stricter conditions of release through the decision-making framework.<sup>206</sup> This observation is especially relevant given the literature on how lower-risk defendants perform with certain release conditions.<sup>207</sup> Studies have shown that lower-risk defendants succeed on release (meaning fewer failures to appear, and fewer rearrests upon release) *more often* when released without conditions, and that placing conditions of release on lower-risk defendants can actually *worsen* their odds of success.<sup>208</sup>

Such a scenario—where defendants are systematically overestimated as riskier than they truly are, leading lower-risk defendants to be subjected to conditions of release that are counterproductive—could perversely sustain an avoidably elevated pretrial failure rate. Similarly, a systematic overestimation of rearrest risk may lead jurisdictions to unduly lean on more controversial, restrictive reforms, such as electronic monitoring.

Consider a hypothetical defendant. She was assessed by a pretrial risk assessment tool that was developed on historical data that predates her county's bail reform. The tool forecast her to be a moderate failure to appear risk and rearrest risk. Accordingly, the jurisdiction's decision-making framework called for her to be subject to monthly in-person reporting to pretrial services, monthly phone check-ins, as well as a curfew. In reality, she was a busy single mother, who simply needed a timely phone reminder to ensure her appearance. If she had been assessed as a lower failure to appear risk, that's the only intervention she would have received. However, the zombie prediction led her to then be subject counterproductive conditions of release. As a single mother, the in-person check-ins and curfew were difficult to manage. Ultimately, she failed to appear for some of her court dates, but appeared to most. This hypothetical is of course stylized. But the risks are plausible given the implementation of today's bail reforms.

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206. Decision-making frameworks are discussed more in the next section.

207. *See generally* CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES (2013) (finding that “the differences between those who received pretrial supervision and those who did not was most pronounced for higher-risk defendants”); Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, FED. PROBATION, Sept. 2009, at 30, [http://www.uscourts.gov/sites/default/files/fed\\_probation\\_sept\\_2009\\_test\\_2.pdf](http://www.uscourts.gov/sites/default/files/fed_probation_sept_2009_test_2.pdf) [<https://perma.cc/63ZB-4B6Y>] (“Paradoxically, when required of lower-risk defendants, i.e., risk levels 1 and 2, release conditions that included alternatives to detention were more likely to result in pretrial failure. These defendants were, in effect, over-supervised given their risk level.”).

208. *See* LOWENKAMP & VANNOSTRAND, *supra* note 207; VanNostrand & Keebler, *supra* note 207.

As an example, consider New Jersey. Below is a comparison of the percentage of defendants that the state *expected* would be subject to each set of conditions of release—what New Jersey calls pretrial monitoring levels (PML)<sup>209</sup>—versus the actual percentages of defendants who were subject to each level.<sup>210</sup>

**Table 9:**  
**New Jersey’s Projected Conditions of Release vs. Actuals**  
1/1/17-12/31/17<sup>211</sup>

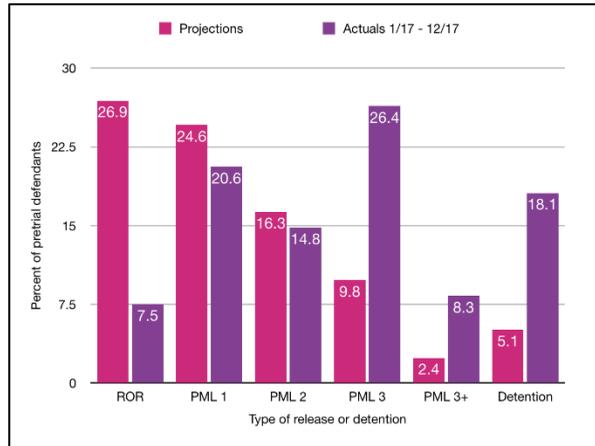
	<b>DMF recommended %s</b>	<b>Actual State Avg. %s 1/1/17-12/31/17</b>	<b>Net difference</b>
<b>ROR</b>	26.9	7.5	- 19.4
<b>PML 1</b>	24.6	20.6	- 4.0
<b>PML 2</b>	16.3	14.8	- 1.5
<b>PML 3</b>	9.8	26.4	+ 16.6
<b>PML 3 +</b>	2.4	8.3	+ 5.9
<b>Detention</b>	5.1	18.1	+ 13.00

209. ACLU OF N.J., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS & STATE OF N.J. OFFICE OF THE PUB. DEF., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 11 (2016) [hereinafter N.J. PRETRIAL JUSTICE MANUAL], <https://www.nacdl.org/NJPretrial/> [<https://perma.cc/R6V3-5BSG>].

210. *Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants January 1 – December 31, 2017*, N.J. COURTS, <https://www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf> [<https://perma.cc/3PWV-GVTY>]; see also *Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants January 1, 2018 – September 30, 2018*, N.J. COURTS, <https://www.njcourts.gov/courts/assets/criminal/cjrreport2018.pdf?cacheID=R6PoVYo> [<https://perma.cc/M69V-RZDG>].

211. *Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants January 1 – December 31, 2017*, *supra* note 210.

**Figure 4:**  
(Taken from Data in Table 9)



**Table 10:**  
**New Jersey's Projected Conditions of Release vs. Actuals**  
**1/1/18-9/30/18<sup>212</sup>**

	<b>DMF recommended %s</b>	<b>Actual State Avg. %s 1/1/18-9/30/18</b>	<b>Net difference</b>
<b>ROR</b>	26.9	8.8	- 18.1
<b>PML 1</b>	24.6	17.2	- 7.4
<b>PML 2</b>	16.3	17.3	+ 1.0
<b>PML 3</b>	9.8	27.2	+ 17.4
<b>PML 3 +</b>	2.4	5.7	+ 3.3
<b>Detention</b>	5.1	19.2	+ 14.1

Here, about one-third more defendants were subject to the most restrictive conditions of release, or were denied release, than the state anticipated. And while the state expected nearly a quarter of defendants to be released on recognizance, only 7.5–8.8% of defendants were. Meanwhile, while only 10% of defendants were supposed to be subject to the relatively intense monitoring known as PML 3, in fact more than a

<sup>212</sup> Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants January 1, 2018 – September 30, 2018, *supra* note 210.

quarter were. The projected and actual intensities of pretrial supervision are nearly perfectly reversed.

Based on available data, it is difficult to explain these gaps.<sup>213</sup> One potential explanation is that more defendants than expected were charged with crimes that carry a presumptive recommendation detention or high-levels of supervision. Another possibility is that defendants have systematically been overestimated as risky, and thus subject to more punitive and restrictive conditions of release. Similarly, it could be that defendants' risk was assessed as lower, but judges systematically increased conditions of release. Of course, all the above could be true.

But, under this Article's argument, when defendants are systematically overestimated as riskier than they truly are (and thus subject to conditions of release that are potentially counterproductive), jurisdictions could, perversely, sustain an avoidably elevated pretrial failure rate.<sup>214</sup> As a result, policymakers in the future might look back on the move toward non-financial conditions of release as misguided and might inaccurately conclude that, despite its ills, a money bail system is the least bad option.

Here, the history of bail reform is instructive: conservatives in the late 1960s used the logic of liberal reforms to, in turn, advocate for a broader, more punitive system. Similarly, though pretrial risk assessment tools currently enjoy bipartisan support in the mission of decarceration, pretrial risk assessment tools and decision-making frameworks are vulnerable to a new "law and order" turn. In fact, New Jersey's Attorney General just recently released modified guidance related to its decision-making framework, adjusting many recommendations to favor lower standards for pretrial detention.<sup>215</sup>

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213. To our knowledge, New Jersey has not released data on failure to appear or rearrest rates for 2017. Nor has New Jersey released data on how many defendants received what kind of PSA classification. Thus, we cannot compare risk forecast, against conditions of release, against pretrial failure rates. As a result, we cannot clearly evaluate whether or not defendants were systematically overestimated as riskier than they truly were. Nor can we see the effects these conditions of release have.

214. We do not suggest that in every case this would be true. Of course, local conditions vary considerably. Some jurisdictions might have put a premium on releasing a majority of defendants on their own recognizance, or with the minimal set of conditions. Others might experience a decline in cases where certain charges require certain more restrictive conditions of release.

215. For example, many modifications "recalibrate[d] the presumptions for pretrial-detention applications that are triggered by the PSA scores" downward. *See* Memorandum from Christopher S. Porrino, N.J. Att'y Gen. to Director, Div. of Criminal Justice et al. (May 24, 2017), [http://nj.gov/oag/newsreleases17/Revised-AG-Directive-2016-6\\_Introductory-Memo.pdf](http://nj.gov/oag/newsreleases17/Revised-AG-Directive-2016-6_Introductory-Memo.pdf) [<https://perma.cc/722W-TVX2>].

### C. Frameworks of Moral Judgment

Between any statistical estimate of risk and the deciding judge, there is an important mediating layer—a series of choices about what the risk estimates mean, how much risk is tolerable, how to manage that risk, and how to communicate that information to a judge. Though there is growing public debate about the quantitative interstices of risk assessment, there is relatively little discussion of the vital policy judgments that render those risk numbers into actionable advice.<sup>216</sup>

These policy judgments are often represented in matrices, somewhat interchangeably referred to as a “structured decision-making process,” “pretrial decision-making matrix,” “decision making framework,” “praxis,” or, most recently, a “release conditions matrix.”<sup>217</sup> These

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216. See, e.g., Sam Corbett-Davies, Emma Pierson, Avi Feller & Sharad Goel, *A Computer Program Used for Bail and Sentencing Decisions was Labeled Biased Against Blacks. It's Actually Not That Clear*, WASH. POST (Oct. 17, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/?utm\\_term=.33e6169658ac](https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/?utm_term=.33e6169658ac) [<https://perma.cc/8Q3U-25HS>]; Sam Corbett-Davies, Sharad Goel & Sandra González-Bailón, *Even Imperfect Algorithms Can Improve the Criminal Justice System*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/upshot/algorithms-bail-criminal-justice-system.html> (last visited Nov. 11, 2018); Issie Lapowsky, *One State's Bail Reform Exposes the Promise and Pitfalls of Tech-Driven Justice*, WIRED (Sept. 5, 2017, 7:00 AM), <https://www.wired.com/story/bail-reform-tech-justice/> [<https://perma.cc/G9YK-7JUJ>]; Adam Liptak, *Sent to Prison by a Software Program's Secret Algorithms*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html> (last visited Nov. 11, 2018); Megan Stevenson, Opinion, *In US Bail Reform, Justice-By-Algorithm Can Only Go So Far*, HILL (Feb. 2, 2018, 8:15 AM), <https://thehill.com/opinion/civil-rights/371954-in-us-bail-reform-justice-by-algorithm-can-only-go-so-far> [<https://perma.cc/6V3U-GW64>]; Elizabeth Glazer, Hannah Jane Sassaman & Jon Wool, *Debating Risk-Assessment Tools: Experts Weigh in on Whether Algorithms Have a Place in our Criminal Justice System*, MARSHALL PROJECT (Oct. 25, 2017, 2:29 PM), <https://www.themarshallproject.org/2017/10/25/debating-risk-assessment-tools> [<https://perma.cc/43MU-XA7R>]; Logan Koepke, *A Reality Check: Algorithms in Courtroom*, MEDIUM (Dec. 21 2017), <https://medium.com/equal-future/a-reality-check-algorithms-in-the-courtroom-7c972da182c5> [<https://perma.cc/S3ZR-TN6X>]; Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform> [<https://perma.cc/VPE4-SYFZ>].

217. See generally MONA DANNER, MARIE VANNOSTRAND & LISA SPRUANCE, RACE AND GENDER NEUTRAL PRETRIAL RISK ASSESSMENT, RELEASE RECOMMENDATIONS, AND SUPERVISION: VPRAI AND PRAXIS REVISED (2016), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/race-and-gender-neutral-pretrial-risk-assessment-release-recommendations-and-supervision.pdf> [<https://perma.cc/LER3-HTB2>]; N.J. COURTS, PRETRIAL RELEASE RECOMMENDATION DECISION MAKING FRAMEWORK (DMF) (2018), <https://www.njcourts.gov/courts/assets/criminal/decmakframwork.pdf> [<https://perma.cc/L598-Y5W3>]; LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT IMPLEMENTATION GUIDES: 9. GUIDE TO THE RELEASE CONDITIONS MATRIX (2018) [hereinafter GUIDE TO THE

matrices attach risk assessment scores to a proposed course of action for a judge or pretrial service agency. The frameworks are similar to bail schedules. But, where charged offenses might have previously determined outcomes in bail schedules, risk assessment scores guide conditions of release (or non-release) in decision-making frameworks.

Below is a visual summary of the decision-making framework used in New Jersey.<sup>218</sup>

**Figure 5:  
New Jersey’s Decision-making Framework<sup>219</sup>**

DMF MATRIX						
	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	Risk Level Green – Recommendation ROR	Risk Level Green – Recommendation ROR				
FTA 2	Risk Level Green – Recommendation ROR	Risk Level Green – Recommendation ROR	Risk Level Light Green – Recommendation PML 1	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	
FTA 3		Risk Level Light Green – Recommendation PML 1	Risk Level Light Green – Recommendation PML 1	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	Risk Level Red – No Release Recommended
FTA 4		Risk Level Light Green – Recommendation PML 1	Risk Level Light Green – Recommendation PML 1	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	Risk Level Red – No Release Recommended
FTA 5		Risk Level Yellow – Recommendation PML 2	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	Risk Level Dark Orange – Recommendation PML 3 + EM/HD	Risk Level Red – No Release Recommended
FTA 6				Risk Level Red – No Release Recommended	Risk Level Red – No Release Recommended	Risk Level Red – No Release Recommended

In the above example, a defendant who receives a new criminal arrest score of four (“NCA 4”) and a failure to appear score of three (“FTA 3”) would be suggested for what New Jersey calls “pretrial monitoring level 2” (“PML 2”). Each pretrial monitoring level calls for different non-financial conditions of release, with each increase in pretrial monitoring level calling for a requisite increase in the number or kind of conditions. For example, PML 2 includes various conditions for a

RELEASE CONDITIONS MATRIX], <https://psapretrial.org/implementation/guides/managing-risk/guide-to-the-release-conditions-matrix> (last visited Nov. 6, 2018).

218. N.J. COURTS, *supra* note 217, at 4.

219. *Id.*

pretrial defendant like reporting once a month in person, once a month by phone, and abide by some set of other restrictions, like a curfew.<sup>220</sup>

In addition to the moral and political question of how to respond to risk, there are essential factual questions at the core of risk assessment implementation that today's instruments make no attempt to answer. These questions concern responsiveness: how will various defendants *respond* to particular pretrial services and conditions? Pretrial risk assessment instruments do not speak to which conditions will work best, or will prove harmful, for which defendants.

In short, it is vitally important to understand that the specific *contents* of these grids are not supplied by statistical evidence. For all the public discussion of validation and evidence-based practice, implementing a risk assessment still requires someone to use clinical judgment to estimate, non-statistically, which defendants would be helped or harmed by which conditions.

To be sure, some numbers do exist that bear on this question—for example, as discussed above, studies have found that imposing burdensome conditions can actually *increase* the risks posed by low risk defendants. But when a jurisdiction applies such findings or assesses local numbers to create its own grid, it inevitably must run such numbers through a filter of human judgment. Even in the most evidence-based of jurisdictions, the decision-making framework necessarily reflects expert opinion about which conditions tend to work well for whom. And such opinions, while a vital resource, should not be regarded as scientific findings.

### 1. *Undemocratic Justice*

Determining how much risk a society should tolerate, and then formalizing those answers inside decision-making frameworks, is a difficult political and moral question, not a primarily technical one. To date, however, this decision has generally not been a target of considered political or policy debate.

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220. *Id.* at 10. Note that, in some jurisdictions, some charges or circumstances may predetermine an outcome where pretrial detention will be ordered regardless of the risk assessment result. Typically, these charges might include murder, rape, first degree robbery, felony domestic violence, violation of a protective order, felony sex crimes, or charges involving the use of a weapon. Another example of a DMF matrix can be seen in Volusia County, Florida. There, the release with conditions level 1 requires monthly reporting, release with conditions level 2 requires bi-weekly reporting, and release with conditions level 3 requires weekly in-person meeting. *See* DAL PRA, *supra* note 150, at 50.

The description of a defendant or group of defendants as “high risk,” for example, singles that group out for different treatment, and there is no mathematical rule about how expansive the category should be, or what it should or does mean.<sup>221</sup>

To see the quandary, it may be helpful to imagine defendants lined up in descending order of their respective risk levels as calculated by a statistical model. The most widely used metric for the performance of a risk assessment instrument is the “Area Under the Curve” (AUC) metric, which simply measures the likelihood that when two individuals are picked at random, the one with the higher score actually does have a higher true level of risk.<sup>222</sup> In other words, the AUC measures the extent to which a risk tool places different defendants into correct rank order of riskiness for whatever the tool measures. The AUC does not, however, say anything about the *size* of the difference in risk level between any two individuals, or between any two deciles in the risk distribution.

The question of how to define and use risk categories, in short, may best be answered by tandem consideration of three things—a community’s preferences and moral judgments; the specifics of how “risk” has been defined and measured; and a histogram that literally displays the shape of how that risk is distributed in the population of defendants.

To date, few if any jurisdictions have successfully combined these elements. Instead, risk categories are defined by technicians and interpreted (or at times misinterpreted) by judges. One advocate who works on bail reform across many U.S. jurisdictions told us that, when he asks judicial system stakeholders what “high risk” means in their jurisdiction, many confess ignorance and others speculate that high risk many mean a greater than 50% chance of reoffends.<sup>223</sup> (In fact, even for

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221. This is especially true where the Public Safety Assessment’s dashboard displays a “stop sign” when a defendant’s new criminal activity is too high and is deemed to be an “elevated risk of violence.” See LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT 10, <https://nccalj.org/wp-content/uploads/2016/02/Virginia-Bersch-PSA-State-of-North-Carolina.pdf> (2016) [<https://perma.cc/7SP9-7WXM>] (PowerPoint presentation).

222. Jay P. Singh, *Predictive Validity Performance Indicators in Violence Risk Assessment: A Methodological Primer*, 31 BEHAV. SCI. & LAW 8, 19 (2013) (“[A] number of performance indicators are available to researchers . . . the AUC has become ubiquitous in studies attempting to establish predictive validity.”).

223. More generally, the vocabulary used in the pretrial risk context—“this person is a high risk”—largely diverges from how individuals perceive the assessed risk. That is: though an individual may be assessed as “high risk,” the rate of reoffense for the “high risk” group may resemble a probability that is rather *low*, not “high.” Take the earlier CPAT example. The “highest risk” category of failure to appear in the PSA is 40%. Within the internal logic of the pretrial risk assessment tool and relative sample, 40% is “high risk.” But more generally, a 40% probability that

the highest risk categories, the actual failure rates are much lower than this).

Further, the process by which a society determines and formalizes answers to how much risk to tolerate must be a democratic one. There is, potentially, a strong incentive for certain actors *within* the criminal justice system to perpetuate relatively high levels of pretrial detention. This is especially true of private actors who contract with local governments.<sup>224</sup>

This is not to say that local governments should be wary of expert help available from private industry, just that those actors should not play an outsized role in developing decision-making frameworks. Nor should policymakers rely upon a decision-making framework successfully developed and deployed in another jurisdiction. True, there may also be a strong political incentive to rely on contractors. A message that a framework, developed by experts, which has succeeded elsewhere, might seem attractive. However, the question addressed is about the community. Thus, the process should include elected policymakers, judges, public defenders, individuals returning from incarceration, advocates, prosecutors, and the general public.<sup>225</sup> A broad-based coalition would not only likely enhance perceptions of a decision-making framework's legitimacy, but also empower communities to stick with their plan of reform after high-profile incidents of pretrial crime.

#### D. *Longer-term Dangers*

Beyond the immediate concerns detailed above, a bail reform movement predicated on the widespread adoption of pretrial risk assessment also presents at least three longer-term dangers to the norms

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some event will occur could easily be understood as “unlikely” or “doubtful.” See, e.g., RICHARDS J. HEUER, JR., *PSYCHOLOGY OF INTELLIGENCE ANALYSIS* 154–55 (1999); Zonation, *Perceptions of Probability and Numbers - Gallery*, GITHUB, <https://github.com/zonation/perceptions> [<https://perma.cc/96BZ-9JZS>].

224. That is to say, so long as “problems” continue to exist, private actors can continue to sell their services to help alleviate that problem.

225. Here, Mesa, Colorado actually serves as a good example. Officials developed a pretrial working group which consisted of “Judges, Public Defenders, District Attorneys, Private Defense Lawyers, Pretrial Services Officials, Mesa County Jail Officials, and Victim Advocates.” See MESA CTY., *MESA COUNTY EVIDENCE-BASED PRETRIAL IMPLEMENTATION GUIDE 6* (2015), <https://web.archive.org/web/20170202153208/http://www.apainc.org/wp-content/uploads/Mesa-County-Evidenced-Based-Pretrial-Implementation-Guide-1.pdf> (last visited Nov. 12, 2018). Ultimately, “new Guidelines were developed collaboratively, albeit through many heated and confrontational meetings . . . . The Chief Judge, the District Attorney and the Sheriff signed this document, which showed a strong collaborative framework. The public and private defenders also showed support in the development and implementation of this document.” *Id.* at 11.

and jurisprudence of pretrial justice. First, statistical risk assessment—including future machine learning-based approaches—may insulate poorly defined concepts of “dangerousness” from essential scrutiny. Second, the embrace of a risk-based approach could ultimately trigger an *increase* in preventive detention. Third, the constitutionality of preventive detention will be left unexamined because pretrial risk assessments tacitly presume that *Salerno*’s core holding was correct.

1. *Insulating Nebulous Concepts of “Dangerousness” From Scrutiny*

One of the great ironies of the push to consider dangerousness at bail is that none of the professional communities involved has seized the mantle to *define* dangerousness. As Marc Miller and Norval Morris argued, by initially considering predictions of dangerousness to be “‘the province of psychiatry,’ lawyers foreclosed appropriate jurisprudential consideration of the use of predictions.”<sup>226</sup> That reliance came at a time when psychiatrists disclaimed their ability as a profession to predict future dangerousness.<sup>227</sup> With no one stakeholder claiming the mantle, courts began to allow “much greater reliance . . . on psychological predictions of dangerousness than do the organized professions of psychiatry and psychology.”<sup>228</sup>

This pattern of de facto abdication of responsibility by lawyers and jurists continues today, but with the developers of risk assessment tools stepping into the extra-judicial, expert role formerly filled by psychologists.<sup>229</sup> As risk assessment designers move from today’s logistic regression-based techniques toward more complex machine learning techniques, this may reinforce lawyers’ impression that they do not belong at the table. If lawyers conceive predictions of pretrial failure

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226. Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 393, 404 (1987).

227. Brief for Am. Psychiatric Ass’n as Amicus Curiae at 12, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) (“The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”).

228. Miller & Morris, *supra* note 226.

229. As an example, consider the Public Safety Assessment’s prediction of “New Violent Criminal Activity.” “Violent criminal activity” might, on the surface, seem like a good approximation for “dangerousness.” But, as detailed above, the PSA was developed on data from nearly 200 different counties and cities and nearly 100 federal judicial districts, *which, as a group, do not share a uniform definition of violent felonies*. Thus, when the PSA tool claims to predict “New Violent Criminal Activity,” it may not be possible to state precisely what the PSA’s violence model is even *trying* to predict. Put differently, the instrument may have as its outcome variable a statistical amalgam that does not precisely match any real world definition of “violence,” and is instead unaccountably intermediate among the range of definitions employed by the jurisdictions in its training set.

as the province of the data scientists who design new, advanced pretrial risk assessment tools, they may, yet again, foreclose appropriate jurisprudential consideration of the use of those predictions. Similarly, courts may begin to place much greater reliance on what a sophisticated computer program says, even though data scientists disclaimed their program's ability to predict pretrial failure for a specific individual.

## 2. *The Expansion of Preventive Detention*

A bail regime predicated on pretrial risk assessment may reduce the overall incidence of pretrial detention, especially where a risk assessment replaces a money bail system. Simultaneously, however, such a bail regime could lead to an increase in the number of defendants who are *preventively* detained pretrial—meaning they were never offered a path of release. For various reasons, explored more below, such a development should concern bail reformers.

Consider Maryland. Statewide, one quarter of defendants are held without bail after their initial appearance.<sup>230</sup> One explanation for this level of detention may be that only eleven out Maryland's twenty-four counties have pretrial service agencies.<sup>231</sup> As a result, judges may feel that they must detain some individuals that they would otherwise release if the necessary supports or services were available. However, that theory does not explain the results we see elsewhere in the state. In fact, only two counties in Maryland use both pretrial risk assessment and pretrial services.<sup>232</sup> Montgomery County, the state's largest, is one of them.<sup>233</sup> In September 2016, only 3.4% of defendants were held without bail after their initial appearance.<sup>234</sup> One year later, as of September 2017, 19.3% of defendants were held without bail after their initial

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230. MD. JUDICIARY, IMPACT OF CHANGES TO PRETRIAL RELEASE RULES 33 (2018), <https://mdcourts.gov/sites/default/files/import/media/newsitem/reference/pdfs/impactofbailreviewreport.pdf> [https://perma.cc/A3LV-238E].

231. JAMES AUSTIN & JOHNETTE PEYTON, MARYLAND PRETRIAL RISK ASSESSMENT DATA COLLECTION STUDY app. B at 34 (2014), <http://gocep.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf> [https://perma.cc/W8BQ-XDNS].

232. CHRISTINE BLUMAUER ET AL., ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 26 (2018), [http://www.princeton.edu/sites/default/files/content/Advancing\\_Bail\\_Reform\\_In\\_Maryland\\_2018-Feb27\\_Digital.pdf](http://www.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf) [https://perma.cc/ZBQ7-EYQK].

233. *Bail System Reform FAQ*, MD. ATT'Y GEN., <http://www.marylandattorneygeneral.gov/Pages/BailReform.aspx> [https://perma.cc/57BE-4WBQ] (“Montgomery County and St. Mary’s County are using a validated risk assessment tool for every defendant.”).

234. MD. JUDICIARY, *supra* note 230, at 19.

appearance.<sup>235</sup> St. Mary's County, the other Maryland County with both pretrial risk assessment and services agency, saw the population of defendants held without bail grow from 5.7% in September 2016 to 15.7% in September 2017.<sup>236</sup>

Similarly, three months after reforms were enacted in New Jersey, 12.4% of defendants were preventatively detained.<sup>237</sup> As of December 2017, nearly 20% of defendants are detained without bail.<sup>238</sup> Of course, these statistics belie the greater number of detention motions filed. In 2017, New Jersey filed nearly 20,000 detention motions.<sup>239</sup> The state has kept pace in 2018: from January to September 30, 2018, nearly 17,000 detention motions were filed.<sup>240</sup> Similarly, detention in Lucas County, Ohio increased after the county implemented risk assessment.<sup>241</sup> Overall, even where risk assessment tools are adopted to advance explicitly liberal reforms, nothing inherent to risk assessment guarantees liberal results.<sup>242</sup>

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235. *Id.* at 33.

236. *Id.* at 19, 33.

237. *Judiciary Budget for Fiscal Year 2018: Hearing Before the Senate Budget and Appropriations Committee*, 217th Leg. 4 (N.J. 2017) (remarks of J. Glenn A. Grant, Acting Administrative Director of the Courts), [http://www.judiciary.state.nj.us/pressrel/2017/SenateBudgetCommitteeRemarks\\_May\\_4\\_2017.pdf](http://www.judiciary.state.nj.us/pressrel/2017/SenateBudgetCommitteeRemarks_May_4_2017.pdf) [<https://perma.cc/MWP9-X736>].

238. *Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants January 1 – December 31, 2017*, *supra* note 210.

239. *Chart B - Supplemental Graph: Detention Motions for Criminal Justice Reform Eligible Defendants, Defendants Arrested in January 1 - December 31, 2017*, N.J. COURTS, <https://www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf> [<https://perma.cc/3PWV-GVTY>] (indicating that 41% of motions were granted).

240. *Chart B - Supplemental Graph: Detention Motions for Criminal Justice Reform Eligible Defendants, Defendants Arrested in January 1, 2018 - September 30, 2018*, N.J. COURTS, <https://www.njcourts.gov/courts/assets/criminal/cjrreport2018.pdf?cacheID=R6PoVYo> [<https://perma.cc/M69V-RZDG>] (showing that 39% of motions were granted).

241. MARIE VONNOSTRAND, LUNINOSITY, ASSESSING THE IMPACT OF THE PUBLIC SAFETY ASSESSMENT, LUCAS COUNTY, OHIO 15 (observing that nearly 6% more defendants remained in custody until the final disposition of their case).

242. Consider the immigration context (which is different in significant ways but supports the broader point). In 2013, U.S. Immigration and Customs Enforcement (ICE) deployed the Risk Classification Assessment (RCA) system. Mark Noferi & Robert Koulisch, *The Immigration Detention Risk Assessment*, 29 GEO. IMM. L.J. 45, 48 (2014). The RCA forecast public safety and flight risks to help ICE officials make release or detain recommendations. *Id.* The purpose of the RCA was to “foster alternatives to detention” by ascertaining the “optimal pool of participants.” *Id.* at 59–60. Notably, immigration advocates “uniformly embraced risk assessment with only qualified concerns.” *Id.* at 48. But the tool’s flight risk assessment was based on an interview with questions that such individuals, justifiably, might not want to answer fully or truthfully, like family, residency, and work authorization history. Ultimately, the RCA over-classified individuals as medium and high flight risks and recommended less than 1% of arrestees for release in Baltimore. Robert Koulisch, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB.

Perhaps California's new Senate Bill 10 is most illustrative of this concern: the law is rife with various detention provisions and triggers. For example, the statute directs the newly-established Pretrial Assessment Services to not release anyone assessed as high risk.<sup>243</sup> Regardless of a person's risk score, if they have violated a condition of release in the past *five* years, the law commands Pretrial Assessment Services to not release them.<sup>244</sup> A high risk assessment score, combined with one of four other factors, establishes a "rebuttable presumption that no condition or combination of conditions of pretrial supervision will reasonably assure public safety."<sup>245</sup> While individuals assessed as low risk are supposed to be released,<sup>246</sup> whether individuals assessed as medium risk will be released or detained is subject to the local rules of each superior court.<sup>247</sup> More broadly, the law empowers prosecutors to file a motion seeking prevent detention at any time if the prosecutor believes there is a "substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure protection of the public or a victim."<sup>248</sup> Notably, "substantial reason" is not defined.<sup>249</sup> Functionally, that discretion is essentially unlimited.<sup>250</sup>

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INT. L.J. 1, 5 (2016). Overall, though the RCA was supposed to aid ICE in fostering alternatives to detention and alleviate bed shortages for detainees, it had *exactly the opposite effect*. See *id.* at 33.

243. Act of Aug. 28, 2018, ch. 244, § 1320.10(e)(1), 2018 Cal. Legis. Serv. (West) (S.B. 10).

244. *Id.* § 1320.10(e)(11) ("Notwithstanding subdivisions (a) and (b), Pretrial Assessment Services shall not release . . . [a] person who has violated a condition of pretrial release within the past five years.").

245. *Id.* § 1320(a)(2).

246. *Id.* § 1320.10(b).

247. *Id.* § 1320.11(a) (stating that the "local rule may further expand the list of offenses and factors for which prearrestment release of persons assessed as medium risk is not permitted but shall not provide for the exclusion of release of all medium-risk defendants by Pretrial Assessment Services"). Local advocates have expressed substantial fear related to this provision. See Eric Westervelt, *California's Bail Overhaul May Do More Harm Than Good, Reformers Say*, NPR (Oct. 2, 2018), <https://www.npr.org/2018/10/02/651959950/californias-bail-overhaul-may-do-more-harm-than-good-reformers-say> [<https://perma.cc/Y6FD-C9E7>] ("Local counties based on their political environment and based on their own tendencies around incarceration could increase the net of pretrial detention by simply changing the dial and saying that not only are higher risk people now excluded from release but we also think this broad swath we considered moderate risk would also be excluded from release." (quoting Raj Jayadev, co-founder of the social and legal advocacy group Silicon Valley De-Bug)).

248. Act of Aug. 28, 2018, ch. 244, § 1320.18(5), 2018 Cal. Legis. Serv. (West) (S.B. 10).

249. See Westervelt, *supra* note 247 (quoting Chesa Boudin, a public defender in San Francisco, who notes that "[u]nder this law prosecutors have the discretion to seek pre-emptive detention of a person with no criminal record charged with a low level misdemeanor").

250. *Cf.* CAL. CONST. art. 1, § 12, which states that "[a] person shall be released on bail by sufficient sureties, except for" capital crimes, violent felonies, and felonies—where the latter two

In upholding the 1984 Bail Reform Act, Chief Justice Rehnquist wrote that, “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>251</sup> Of course, this stated principle rings hollow when compared to today’s stark reality. True, an emergent consensus says that individuals should not be detained before trial simply because they are too poor to pay their way out. Yet, even in New Jersey, a pioneering state that eliminated money bail in favor of widespread pretrial risk assessment, nearly one-fifth of defendants are detained pretrial. Ultimately, reforms predicated on pretrial risk assessment may expand the instances in which defendants are preventively detained and denied bail pretrial.<sup>252</sup>

### 3. *Conceding Salerno*

Only a few decades ago, the constitutional propriety of predicting dangerousness pretrial was a matter of vociferous and widespread debate. Yet, oddly, a practice that was once seen as fundamentally at odds with the U.S. Constitution and our system of moral judgment is now seen as an obvious, rational component of pretrial decision-making.<sup>253</sup>

Though there “has been relatively little innovation in the law and scholarship on bail in the twenty years since *Salerno*,”<sup>254</sup> the new era of bail reform requires such innovation. In fact, the logic of a bail reform model predicated on risk assessment “requires that judges have authority to order pretrial preventive detention.”<sup>255</sup> But today, only twenty-two states, the District of Columbia, and the federal system authorize

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offenses require other, particular findings, like “clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.”

251. *United States v. Salerno*, 481 U.S. 739, 755 (1986).

252. True, in many states *before* risk assessment reforms were implemented the “detention net” was already wide. That is, risk assessment reforms did not drive the increase in charges in which a prosecutor could file a preventive detention motion. But the adoption of risk assessment as a means of reform, like in California, shines a bright light on that wide detention net *because* it will be the *only* way in which the criminal justice system detains individuals pretrial—money bail will not offer a *sub rosa* means to do so.

253. Mayson, *supra* note 24, at 495 (2018) (“[A]uthorities on pretrial law and policy—including pretrial laws themselves—now universally identify . . . protecting the public from harm at the hands of defendants” as a core purpose of the pretrial system).

254. Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, *FORDHAM U. L.J.* 121, 123 (2009).

255. Mayson, *supra* note 24, at 515.

preventive detention, and those only in some circumstances.<sup>256</sup> “[T]wenty-three states still guarantee a broad constitutional right to bail and [would] have to amend their constitutions to authorize preventive detention without bail.”<sup>257</sup>

Actuarial tools may, in short, offer bail reformers a Faustian tradeoff: a new approach to pretrial justice that comes with chance (and a hope) of reduced incarceration, but that also ratifies recent erosions of the fundamental rights of the accused. This Article contends that reformers need to be more attentive to this trade-off.

This question ultimately points back to *Salerno*, and the contested question of whether that case was rightly decided. In examining *Salerno*, scholars take particular issue with *Salerno*’s conclusion that preventive detention would not be punitive, and with its treatment of the risk of error in preventive detention decisions.

To determine whether or not a governmental act—in this case, preventive pretrial detention—had punitive effect, the *Salerno* Court applied *Kennedy v. Mendoza-Martinez*.<sup>258</sup> Under that case, the first step was to examine the legislative history of the 1984 Bail Reform Act to determine if there was explicit punitive intent. According to the Court in *Kennedy*, if no punitive congressional intent is discernible, “each factor of the [following] test is to be weighed”<sup>259</sup>:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applied is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.<sup>260</sup>

Where “conclusive evidence of congressional intent as to the penal nature of a statute” is not available, the seven factors “*must* be considered in relation to the statute on its face.”<sup>261</sup>

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256. SUSAN KEILITZ & SARA SAPIA, NAT’L CTR. ON STATE COURTS, PREVENTIVE DETENTION 1 (2017).

257. Mayson, *supra* note 24, at 515–16.

258. 372 U.S. 144 (1963).

259. Michael J. Eason, *Eighth Amendment—What Will Become of the Innocent*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1061–62 (1988).

260. *Kennedy*, 372 U.S. at 168–69 (citations omitted).

261. *Id.* at 169 (emphasis added).

But, as Professor Jean Koh Peters argues, the two key cases upon which *Salerno* relied had already derogated from this test. In *Bell v. Wolfish*,<sup>262</sup> the Court stated that:

[a]bsent a showing of an express[ ] intent to punish . . . that determination generally will turn on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].” Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, *without more*, amount to “punishment.”<sup>263</sup>

By narrowly interpreting *Kennedy* this way, “the *Bell* Court effectively amputated the first five *Kennedy* criteria.”<sup>264</sup> Of utmost importance, according to the *Bell* Court, was whether or not the policy in question was reasonably related to a “legitimate state objective.”<sup>265</sup> After fully quoting the *Kennedy* test, Justice Rehnquist “supported his drastic restatement of the test with neither precedent nor logic. In fact, *he did not even acknowledge the change.*”<sup>266</sup> *Schall*, in turn, relied on *Bell*’s truncated version of the *Kennedy* criteria to find that juveniles could be detained before trial to prevent their commission of conduct that would be a crime if committed by an adult.<sup>267</sup>

This is the foundation upon which *Salerno* relies. So long as a statute authorizing pretrial detention did not *intend* to be punitive, and so long as it could be understood as “reasonably related” to a legitimate governmental interest, it would not fall within the definition of punishment.<sup>268</sup>

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262. 441 U.S. 520 (1979).

263. *Id.* at 538.

264. Jean Koh Peters, *Schall v. Martin and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641, 652 (1990).

265. *Id.*

266. Eason, *supra* note 259, at 1063 (emphasis added).

267. But in doing so, the Court actually *further* cabined its analysis. Specifically, the Court in *Schall* only evaluated whether or not the text of the New York Family Act statute evidenced punitive intent, whereas the Court in *Kennedy* had examined legislative history that “revealed not only a predecessor statute that had called the measure a ‘penalty,’ but also legislative memoranda and floor debates replete with punitive language.” Peters, *supra* note 264, at 659.

268. See, e.g., Albert Alschuler, *Preventive Pretrial Detention and the Failure of the Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 537 (1987) (“[T]he Court’s two-tiered framework [in *Schall*] seems to mandate the conclusion not only that every scheme of adult pretrial detention enacted by state and federal legislatures is constitutional but that detention simply on the basis of test scores would be constitutional as well.”); Margaret S. Gain, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE W. RES. L. REV. 1371, 1378–84

Under this formulation, once the *Salerno* Court determined that Congress did not intend for pretrial detention to be a punitive restriction in the Bail Reform Act,<sup>269</sup> it only needed to identify an “alternate purpose” for the restriction. There, the *Salerno* majority identified the prevention of danger to public safety as a “legitimate regulatory goal.”<sup>270</sup> The *Salerno* Court did not even mention the other five *Kennedy* criteria.<sup>271</sup> Nor does the majority acknowledge, as an earlier case had held, that “even a clear legislative classification of a statute as ‘non-penal’ would not alter the fundamental nature,” or effect, “of a plainly penal statute.”<sup>272</sup>

Once it found that preventive pretrial detention was regulatory rather than punitive, the *Salerno* Court next applied *Mathews v. Eldridge*.<sup>273</sup> *Mathews* established a three-factor balancing test to determine what kinds of procedures are required once an individual has been deprived of life, liberty, or property on a regulatory basis:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>274</sup>

Generally, when the liberty or property interest is weightier, more process is required. So, for example, depriving someone of their

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(1989) (noting that so long as no congressional intent to punish could be discerned, the Court only needed to find an “alternate purpose” and “determine that the means chosen for implementation were not excessive in relation to that purpose”).

269. *United States v. Salerno*, 481 U.S. 739, 747 (1987).

270. *Id.*

271. M. Gray Styers, Jr., *United States v. Salerno: Pretrial Detention Seen Through the Looking Glass*, 66 N.C.L. REV. 616, 626 (1988).

272. *Trop v. Dulles*, 356 U.S. 86, 95 (1958). In other contexts, the Court has distinguished between what Congress calls an action and the effect of that action. *See, e.g.*, *United States v. Constantine*, 296 U.S. 287, 294 (1935) (“But even though the statute was not adopted to penalize violations of the amendment, it ceased to be enforceable at the date of repeal if, in fact, its purpose is to punish, rather than to tax.”); *United States v. La Franca*, 282 U.S. 568, 572 (1931) (“No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.”); *Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922) (“When, by its very nature the imposition is a penalty, it must be so regarded.”); *Helwig v. United States*, 188 U.S. 605, 613 (1903) (“[T]he use of those words does not change the nature and character of the enactment.”).

273. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

274. *Id.* at 335.

fundamental interest in freedom from detention would require substantial process.<sup>275</sup>

But here again, Peters argues, an earlier case had distorted the relevant precedent and set the stage for *Salerno* to disregard that precedent. *Schall* had ignored the first part of *Mathews*'s second factor, risk of error, "by focusing not upon the question of whether a prediction can be accurate, but rather upon the far more simplistic question of whether the prediction can be made or 'attain[ed].'"<sup>276</sup> To the extent that the *Schall* majority confronted how predictions of future criminal conduct are made, the Court recognized that "prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified . . . . The decision is based on as much information as can reasonably be obtained at the initial appearance."<sup>277</sup> As Peters argued, if the *Salerno* Court were forced to apply *Mathews*'s second criterion, "it would have been obliged to evaluate not whether any detention are justified, but rather whether the risk of erroneous detentions would be unacceptable."<sup>278</sup>

But the *Salerno* Court did not do so. Following the *Schall* majority's lead, the *Salerno* Court's analysis was largely framed as a two-pronged balancing process: society's interest, on the one hand, to prevent crime, and the individual's interest, on the other, in their liberty.<sup>279</sup> The *Salerno* Court neither "acknowledged nor discussed the [second] *Mathews* . . . criteria, the risk of error in current procedure and the probable value of additional or substitute procedures, respectively."<sup>280</sup> To the extent the *Salerno* Court even referenced the procedures of the Bail Reform Act, it simply recited provisions of the Act, but did not

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275. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute safeguards.'" (citation omitted)).

276. Peters, *supra* note 264, at 677.

277. *Schall v. Martin*, 467 U.S. 253, 279 (1984).

278. Peters, *supra* note 264, at 690 (emphasis omitted).

279. Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 363 (1994) ("Again, the Court exhaustively considered treatment of the government's interests while only begrudgingly recognizing an adult individual's interest to be free from governmental restraint. Rhetorically, to mask the basis of the decision, the losing interest ought to receive more time than the winning one. In *Salerno*, this rhetoric is not the case."); see also Albert W. Alschuler, *Preventive Detention and the Failure of the Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 511 n.1 (1986) ("[T]he Supreme Court's current approach to the due process clause has tilted too far toward interest balancing and too far from historic concepts of individual freedom.").

280. Peters, *supra* note 264, at 686.

examine whether “additional or substitute” procedures held any probable value.<sup>281</sup> Without any citation, the Court proclaimed that “the procedures by which a judicial officer evaluates the likelihood of future dangerousness [under the Bail Reform Act] are specifically designed to further the accuracy of that determination.”<sup>282</sup>

Worse, whatever one thinks of the safeguards that the Bail Reform Act of 1984 provides, they are irrelevant when examining the “‘probable value, if any, of additional or substitute procedural safeguard,’ *if indeed no procedures, no matter how intricate, could ever make the procedure more accurate.*”<sup>283</sup> By ignoring the second part of the *Mathews* test, the *Salerno* Court avoided squarely addressing whether or not predictions of dangerousness could ever be tolerably accurate.<sup>284</sup>

Of course, since *Salerno*, the Supreme Court “reversed course” on the application of *Mathews* in matters of state criminal procedures.<sup>285</sup> In *Medina v. California*,<sup>286</sup> the Court held that “a state rule of criminal procedure not governed by a specific rule set out in the Bill of Rights violates the Due Process Clause of the Fourteenth Amendment only if it offends a fundamental and deeply rooted principle of justice.”<sup>287</sup>

Whether *Mathews*’s balancing test applies, or *Medina*’s “principle of justice so rooted in the traditions and conscience”<sup>288</sup> standard applies, the accuracy of a prediction of future danger should be core to a due process analysis.<sup>289</sup> That’s especially true for a pretrial justice system based on a risk assessment tool. The risk of a pretrial risk assessment tool mislabeling someone as risky based on old and otherwise non-representative data—and thus keeps them in jail for longer, or makes it more likely that they will commit crimes in the future—raises significant issues under *Mathews* or *Medina*.

281. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

282. *United States v. Salerno*, 481 U.S. 739, 751 (1987).

283. Peters, *supra* note 264, at 690 (emphasis added).

284. Charles P. Ewing, Schall v. Martin: *Preventive Detention and Dangerousness Through the Looking Glass*, 34 BUFF. L. REV. 173 (1985) (arguing that, based on a survey of the literature, predictions of violent and criminal behavior are wrong more often than they are right).

285. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL. REV. 1, 15 (2006).

286. 505 U.S. 437 (1992).

287. *Nelson v. Colorado*, 581 U.S. \_\_\_, 137 S. Ct. 1249, 1258 (2017) (Alito, J., concurring).

288. *Medina*, 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

289. Under *Mathews* the relative accuracy of a risk assessment—as compared to another risk assessment, or other procedures—is of significant importance. Under *Medina*, the “fundamental and deeply rooted principle of justice” is presumption of innocence. *Nelson*, 137 S. Ct. at 1258. There, what matters is the process by which that presumption is rebutted. *See id.* at 1255 (“[A]xiomatic and elementary,’ the presumption of innocence ‘lies at the foundation of our criminal law.’” (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895))).

Further, if a bail system centered on pretrial risk assessment does, in some instances, lead to a higher incidence of preventive detention, it is all the more urgent for reformers to squarely address whether or not *Salerno* was rightly decided.

Even if one were to agree with the core holdings of *Salerno*—that the Constitution does not provide an affirmative right to bail and does not definitively prohibit preventative detention—several pressing questions remain open and underexplored. First, *Salerno* said nothing about “what degree of risk it thought constitutionally sufficient to justify detention.”<sup>290</sup> That question is perhaps “the most important [element] of risk assessment . . . because it marks the compromise between the presumption of innocence, decarceration, and public safety.”<sup>291</sup>

If it were determined that judges or pretrial risk assessment tools cannot predict dangerousness with adequate reliability, “pretrial detention [might] not be rationally related to the goal of reducing pretrial crime.”<sup>292</sup> Finally, *Salerno* dictates that “detention prior to trial . . . is the carefully limited exception.”<sup>293</sup> A risk-based bail system seemingly requires some defendants to be detained, without ever having been offered a path of release. But how many such cases are allowable until it can be no longer be said that detention is the “carefully limited exception?”

Of course, risk assessment tools themselves cannot “answer [the] normative question at the heart of contemporary pretrial justice . . . how certain must we be that the person will commit a crime or not appear in court?”<sup>294</sup> Instead, bail reform predicated on risk assessment means that answers to this question are all the more urgent and necessary.<sup>295</sup>

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290. Mayson, *supra* note 24, at 498.

291. Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1145 (2018).

292. Eason, *supra* note 259, at 1065.

293. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

294. Note, *supra* note 291, at 1145.

295. Here, Sandra Mayson’s recent work deserves special note. Mayson argues that

[T]here is no clear, relevant distinction between defendants and non-defendants who are equally dangerous . . . there is no constitutional text or doctrine that clearly grants the state more expansive preventive authority over defendants than non-defendants. . . . [Further], the practical justifications proffered to support the special preventive restraint of defendants are, at best, incomplete.

Mayson, *supra* note 24, at 499. Given that there is no moral or practical distinction, and like cases should be treated similarly, Mayson develops a “parity principle,” which “holds that the state has no greater authority to preventively restrain a defendant than it does a non-defendant who poses an equal risk.” *Id.* Overall, Mayson argues “[g]iven the trajectory of pretrial reform, it is both an important and an opportune time to clarify the contours of the state’s pretrial powers.” *Id.* at 500.

#### IV. ADDRESSING THE CHALLENGES

##### A. *Pretrial Reform Without Risk Assessment*

Although pretrial risk assessments are often described as a necessary or natural focus for bail reform efforts, this focus is misplaced. Considering the arguments detailed above, and on the basis of the preliminary evidence currently available, it is not safe to assume that pretrial risk assessment instruments will help to reduce today's widespread overuse of pretrial incarceration, or to mitigate the longstanding racial disparities in pretrial justice.<sup>296</sup>

Other policy changes may more effectively and immediately serve the goals of decarceration and fairness in pretrial justice. These other steps include:

*Automatic release of broad categories of defendants:* As detailed above, defendants appear to be best able to succeed on release when they avoid any period at all of pretrial incarceration. Policies that provide for the summary, automatic release on recognizance of defendants charged with certain crimes, such as for example all defendants whose most serious charge is a misdemeanor, could help to ensure that large numbers of defendants are positioned to avoid pretrial incarceration and its harmful effects.

*High procedural burdens for imposing pretrial detention or supervisory conditions:* In New Jersey, for example, one major focus of reform efforts has been to encourage litigation of pretrial release decisions by requiring robust pretrial detention hearings.<sup>297</sup> Practitioners report that these heightened evidentiary standards have played a central role in reducing the use of pretrial incarceration.

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296. Our suggestions here largely accord with the recommendations of more than 100 civil rights, digital rights, and community-based groups, who argue that “[r]eal reform addresses underlying structural inequalities, rather than attempting to triage a structurally flawed system. Jurisdictions can—and should—abolish systems of monetary bail, combat mass incarceration, make meaningful investments in communities, and pursue pretrial fairness and justice without adopting such tools.” See LEADERSHIP CONFERENCE SHARED STATEMENT, *supra* note 124, at 2. Through our work at Upturn, we played a research and advisory role in the development of this statement.

297. For example, New Jersey Court Rule 3:4-2(c) requires the prosecution to turn over any available preliminary incident reports, affidavits of probable cause, “all statements or reports relating to the affidavit of probable cause, . . . all statements or reports relating to additional evidence the State relies on to establish probable cause at the hearing,” statements related to community safety when determining whether to release the defendant, and all exculpatory evidence. N.J. CT. R. 3:4-2(c)(2). *But see* State v. Dickerson, 177 A.3d 788 (2018) (limiting the discovery the state must *automatically* make available to defendants facing a pretrial detention hearing).

*Text message reminders and other supportive pretrial services:* Accused people are more likely to succeed upon release if they are reminded of upcoming court dates. Reminders should be a standard practice for all those released. Other services designed to support success, such as transportation assistance for people who may need help getting to court, can likewise make success on release more likely and thus make release more attractive.

*Front-end reforms that address excessive and racially disparate charging patterns:* Policing changes, such as issuing citations in lieu of arrest, as well as investments in non-police responses to public safety problems, may help to reduce the number of people who face criminal charges in the first place, and to reduce racial disparities in the pretrial population. Similarly, electoral efforts that support the election of progressive prosecutors can help create a world of more measured prosecutorial decision-making and hence less incarceration.

We do not believe that the above steps should be seen as flawless or guaranteed solutions to the deeply rooted injustices of today's bail system. In fact, such steps can at times have paradoxical or unintended consequences, no less than other social policies.<sup>298</sup> However, these steps do speak directly to the challenge of pretrial incarceration, and we believe it would be reasonable for advocates and reform-minded system actors to shift their change-making efforts to focus on steps like these.

## *B. Where Risk Assessment Is Used: Relevant, Timely Data*

### *1. Risk Assessment Tools Should Always Rely on Recent, Local Data*

Jurisdictions that are reforming bail practices should always rely on recent data, gathered after their other pretrial reforms have taken root, to construct or calibrate their risk assessment tools. Existing “off the shelf” risk assessment tools, whose predictions assume that defendants still face the same long odds of succeeding outside jail, should not be used without adjustment in jurisdictions where those risks have been

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298. For example, Maryland Court Rule 4-216.1—which says that judges may not impose a financial condition of release if that condition would lead to the person's pretrial detention—is on its face a progressive policy that should help ensure fewer people are detained pretrial. MA. CT. R. 4-216.1. However, that policy has had its own unintended consequences. While 6% more defendants have been released on their own recognizance, nearly 12% more defendants were held without bail. Data suggests that, “in the absence of [pretrial service] options, many judges are opting to hold defendants in jail pretrial rather than release them on their own recognizance.” See BLUMAUER ET AL., *supra* note 232, at 14.

mitigated. Risk assessment tools developed solely from historical data that predates the enactment of significant risk-mitigating reforms will not reflect defendants' new odds of success on release and could, in turn, hamper overall reform efforts.

What counts as "recent data" will vary, depending on context. For example, a jurisdiction's decision to move from a money bail schedule to a system that presumptively releases all misdemeanor defendants would be a major risk mitigating reform, and no risk assessment instrument should be used unless it can reflect the outcomes of a presumptive-release regime. What's ultimately important is for jurisdictions to track changing patterns of risks and outcomes.

Recent data is indispensable, but earlier data can potentially be responsibly used, given certain conditions. The critical concept is that the scoring process must evolve to reflect declining risks of pretrial failure. Models based partly on older data can be adjusted to reflect more recent developments. Adjustment is possible because the defendants who get released are *themselves* a diverse group, with different (albeit low) levels of failure risk, and their outcomes can be compared both before and after reforms. If released defendants are grouped by the risk score they were assigned at arraignment, so that there are separate groups of released defendants who earned scores of 1, 2, and 3 out of ten (say), the groups should each have different—presumably increasing—rates of pretrial failure. Those rates can be compared both before and after a reform to assess how scores may need to be adjusted.

A regression that compared the failure rates of these before and after reform could reveal by how much, and for which offenders, risks have now been reduced. A regression linking scored risk level to post-reform failure rate can reveal when a jurisdiction has succeeded in reducing the *actual* level of risk associated with each score. The jurisdiction can then either recalibrate the risk scale or simply begin to release more defendants at the higher score levels (which have come to betoken a lower true level of risk than they did initially).

Ultimately, if jurisdictions are to truly rely on and promote "evidence-based practices," they must gather the evidence first. For a pretrial risk assessment tool to promote evidence-based practice, the tool must incorporate recent data that reflects the fact that bail reform policies have mitigated the risks defendants face once released. If jurisdictions cannot, or will not, wait for fresh data to introduce risk assessment, then they must vigorously collect data on the failure rates of defendants

before and after reform.<sup>299</sup> This would empower policymakers to update the model early on and, once they do so, they should weigh the recency of post-reform data higher within the model.

## 2. *Regularly Compare Predictions Against Outcomes*

It is vitally important that jurisdictions track risk scores and subsequent outcomes.<sup>300</sup> This may seem like a simple or obvious suggestion, but current practice lags woefully far behind it. Data collection practices on pretrial outcomes at the county level are notoriously varied, often haphazard, and sometimes totally absent.<sup>301</sup> Some agencies do not or cannot calculate failure to appear rates or pretrial rearrest rates.<sup>302</sup> Even more basic information, like the average length of jail stay for detained pretrial defendants, is sometimes

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299. We expand on the benefits of vigorous pretrial outcome data collection in the next section.

300. Stevenson, *supra* note 126, at 59 (“When a new technique is adopted, outcomes should be monitored to see if the desired effects were achieved. If they were not, adjustments can be made accordingly. In this paradigm, a method would be neither championed nor pilloried until its impacts in practice are clearly understood.”).

301. A 2014 report by the Governor’s Commission to Reform Maryland’s Pretrial System identified the following gaps in available data about Maryland’s pretrial population, which it labeled “Unanswered Questions”:

How many defendants post bond? How many defendants are released on pretrial supervision? How many defendants released pretrial are arrested prior to trial? Of those defendants on pretrial supervision, how many fail to appear for court or get arrested prior to trial? What is the risk level of each defendant detained pretrial in jail? How many pretrial defendants are detained in jail who could not post bond? What was the bond amount? What is the average length of stay of pretrial defendants detained in jail?

COMM’N TO REFORM MD’S PRETRIAL SYSTEM, FINAL REPORT 15 (2014), <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf> [<https://perma.cc/U37Z-8SAM>].

302. *See, e.g.*, OHIO CRIMINAL SENTENCING COMM’N, AD HOC COMM. ON BAIL & PRETRIAL SERVS., FINAL REPORT & RECOMMENDATIONS 18 (2017), <https://www.supremecourt.ohio.gov/Boards/Sentencing/Materials/2017/March/finalAdHocBailReport.pdf> [<https://perma.cc/JSY4-TJVZ>] (“As in other areas of Ohio’s criminal justice system, data regarding pretrial decisions, agencies, and outcomes is rarely collected. Less than 20% of respondents to the Ad Hoc survey collect data on failure to appear rates and even less are collecting data regarding arrests for crimes committed while on release pretrial. The Ad Hoc Committee recommends a dedicated and concerted effort to increase data collection and analysis for all facets of the bail and pretrial system in Ohio. At a minimum, the committee recommends that collection of appearance rates, safety rates, and concurrence rates (how often a judge accepts a pretrial service agency recommendation) be mandated for each jurisdiction.”). Four of fifty-six programs with survey responses in Ohio said they calculate failure to appear rates; zero of fifty-six programs with survey responses said they calculate pretrial rearrest rates, and two of fifty-six calculate release rates. *Id.* at 247, 251, 253.

unavailable or not tracked.<sup>303</sup> Others alter the very pretrial failure rates they seek to measure through technological errors.<sup>304</sup>

Data on the risk scores and subsequent outcomes, whether for all defendants or for a representative sample of them, is necessary in order to understand the relationship between scores and true levels of risk. Without such data, there is no way to know whether the risk assessment data is systematically wrong about the risks posed by defendants. Such regular monitoring would not only allow jurisdictions to evaluate how well their risk assessment tool classifies risk, but also empower jurisdictions to track how reform efforts may be changing risk levels. It is also important for a defendant's risk assessment prediction, their subsequent outcome, and case file to be linked. This would make it possible to analyze how predictions or outcomes correlate with other features, such as a defendant's race, socioeconomic status, recent rearrests, or type of pretrial monitoring. Doing so would help ensure that risk assessment tools lead to more equitable outcomes across race, gender, and socioeconomic status.<sup>305</sup>

Such tracking should also include data on how often judges concur with the risk assessment tool's recommendations, and ideally on their reasons for diverging when they do. By tracking concurrence, divergence, and why a judge diverged, policymakers may be able to create a positive feedback loop. The more that judges understand how a risk assessment tool works, and the more that the developers of a risk assessment tool understand how judges use—or do not use—their tool, the better.

Further, validation studies should not stand in the way of continuous monitoring. Pretrial risk assessment validation studies take time simply because criminal cases *themselves* take a long time to resolve. In order for an entire six-month period of risk assessment predictions to be analyzed, one must observe each case *until* disposition. Such observation

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303. *Id.* at 88, 94–95.

304. In Harris County, newly approved court rules schedule many hearings for within one business day. The county's computer system, however, still tells misdemeanor defendants to return to court in seven days. Misinformed defendants are missing their court dates, which may make the otherwise successful reform look like a failure. See Bryce Covert, *Are Harris County Officials Trying to "Sabotage" Bail Reform with Misleading Data?*, MEDIUM: IN JUST. TODAY (Dec. 8, 2017), <https://medium.com/in-justice-today/advocates-say-harris-county-officials-are-trying-to-sabotage-bail-reform-with-misleading-data-81a1292edca1> [<https://perma.cc/6VP8-8SYQ>].

305. More than 100 civil rights groups recently called for similar requirements, demanding that revalidation of risk assessment tools check for predictive validity and differences across race, gender, and other protected characteristics. See THE LEADERSHIP CONFERENCE SHARED STATEMENT, *supra* note 123, at 8–9.

may last a year and a half, or longer. Accordingly, jurisdictions must resist the temptation to blind themselves from viewing pretrial outcome data *until* each case is resolved. Monthly reporting—though offering an incomplete view—can still provide valuable insight. Overall, validation studies and continuous monitoring need not stand in each other’s way.<sup>306</sup>

Many jurisdictions may lack the technological infrastructure, expertise, and other resources to pay attention to whether their pretrial risk assessments are right or wrong. Such challenges, where they exist, must not be considered a warrant to ignore the question. To the extent policymakers imagine that they can combine bad data with good prediction, a shift in perspective is essential. Data infrastructure is not an afterthought, but an indispensable pillar of the responsible deployment of statistical predictions in pretrial justice.<sup>307</sup>

### 3. *Focus on the Risks that Matter Most*

Pretrial risk assessment tools generally forecast two outcomes: failure to appear and rearrest. It is important to interrogate the gap between the data jurisdictions have and the questions jurisdictions ask of that data.<sup>308</sup>

Currently, forty-five states and the District of Columbia permit either pretrial detention or release subject to restrictions “[a]fter a finding that a defendant poses a danger to an individual or community.”<sup>309</sup> However, most of today’s risk assessment tools only predict future rearrest. As others have observed, the two are not the same. While rearrest for a violent crime might signal danger to an individual or community, rearrest writ large does not. Correlates of rearrest do not so much measure “dangerousness” as they measure—and anticipate—future contact with the criminal justice system.<sup>310</sup>

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306. Civil rights advocates called for validation to occur “annually at the least, with the ideal being quarterly.” *Id.* at 9.

307. *See, e.g.*, ERIKA PARKS ET AL., URBAN INST., LOCAL JUSTICE REINVESTMENT 12 (2016) (“A critical component of justice reinvestment is data analysis and data-driven decision-making . . . . To improve data capacity, local sites developed data warehouses, integrated data systems, data dashboards, and jail population and cost-benefit projection tools.”).

308. *See* LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, SIX THINGS TO KNOW ABOUT ALGORITHM-BASED DECISION-MAKING TOOLS 1 (2018), <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-6Things.pdf> [<https://perma.cc/LGB4-UP45>] (“‘[R]isk scores’ from algorithmic risk assessment tools have little bearing on the risks that really matter to communities.”).

309. Baradaran & McIntyre, *supra* note 62, at 512.

310. DELBERT S. ELLIOTT, CTR. FOR THE STUDY & PREVENTION OF VIOLENCE, LIES, DAMN LIES AND ARREST STATISTICS 11 (1995), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.182.9427&rep=rep1&type=pdf> [<https://perma.cc/6L6U-4BZ2>].

For example, most rearrests pretrial appear to be for technical violations, not new felonies or violent crimes.<sup>311</sup> Federal data from 2012–2014 show that for defendants released to the community pretrial who had at least one violation while on release, technical violations of bail conditions represented the vast majority of all violations in which a new offense was charged.<sup>312</sup> Between 2008 and 2010, 90% of all pretrial violations by federal defendants released were technical violations.<sup>313</sup> The technical conditions of bail are often mundane: curfews, travel restrictions, drug tests, and even keep-your-job requirements.

Other bail reforms will make it all the more important to delineate technical violations from new violent arrests. Jurisdictions will likely release more defendants pretrial by increasing the use of non-financial conditions of release.<sup>314</sup> In all likelihood, this will *increase* the incidence of rearrest for technical violation of release conditions.

Ultimately, communities should determine which public safety risks matter most to them, and researchers, practitioners, and policymakers should act accordingly. Should decisions be based on “the risk of the defendant committing another crime pretrial or the risk of the defendant committing specific crimes pretrial (e.g., violent offences)?”<sup>315</sup> And

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311. A “technical violation” of conditional release, benign as it may sound, can also carry serious and immediate consequences (beyond making the person appear riskier in future risk assessments). The American Bar Association’s Pretrial Release General Principles say that a “person who has been released on conditions and who has violated a condition of release, including willfully failing to appear in court, should be subject to a warrant for arrest, modification of release conditions, revocation of release, or an order of detention, or prosecution on available criminal charges.” ABA, ABA STANDARDS FOR CRIMINAL JUSTICE 19 (3d ed. 2006).

312. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES 15 tbl.3.3 (2015), <https://www.bjs.gov/content/pub/pdf/fjs12st.pdf> [<https://perma.cc/RH6N-KQ79>]; MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2013 - STATISTICAL TABLES 15 tbl.3.3 (2017), <https://www.bjs.gov/content/pub/pdf/fjs13st.pdf> [<https://perma.cc/H8QZ-XDPM>]; MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2014 - STATISTICAL TABLES 15 tbl.3.3 (2017), <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf> [<https://perma.cc/38MP-7PJK>].

313. THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf> [<https://perma.cc/37CH-XDDT>].

314. That is at least already an observable trend in federal-level data—80% of defendants released on personal recognizance received some set of pretrial conditions, while only 40% of defendants with a surety bond release received pretrial conditions. *Id.* at 9; *see also* SANTA CRUZ CTY. PROB. DEP’T, ALTERNATIVES TO CUSTODY REPORT 2015 (2016) (detailing a decrease in the ADP in the first half of the year, followed by a modest increase in the next half). *But see id.* at 11 (“[F]ollowing modifications of the PSA-Court decision making framework, in the first quarter of CY2016 saw a dramatic rise of the [Average Daily Population on pretrial supervision]—almost double of previous years.”).

315. MAMALIAN, *supra* note 132, at 13.

though developers of risk assessment tools sometimes concede that rearrest data is an imperfect measure, they generally defend it as the one of the few measures available—or, the least bad option available. But distinguishing new violent crimes from technical violations is a bare minimum requirement for responsible use of these tools. Similar critiques can be made about failure to appear data. While data on failure to appear does not suffer from sampling bias,<sup>316</sup> the *reasons* defendants fail to appear vary widely and should not be construed to suggest *flight risk*. Thus, generalized failure to appear data flattens the underlying circumstances.

How might jurisdictions interrogate the gap between the data jurisdictions have and the questions jurisdictions ask of that data? As a start, jurisdictions should demand aggregate-level reporting of the development sample or training data for any pretrial risk assessment tool. Such a report should at least disclose: the breakdown of rearrests by charge, severity of charge, age, race, and gender. Failures to appear should also be explained on some metric, like whether the failures are persistent or sporadic. Such a report might tell policymakers that there is a significant gap between the data upon which a risk assessment tool is based and the questions that truly matter to them. Or it might not. Either way, such information is critical for jurisdictions to make an informed decision on whether or not to adopt a risk assessment tool.

Moreover, the risks that matter most might not just be the risks of a defendant's rearrest or failure to appear. As Crystal Yang recently argued, jurisdictions could also consider the risks that pretrial detention might *worsen* a defendant's circumstances.<sup>317</sup> In imagining a “net-benefit” assessment, Yang argues that risk assessment tools could be used to “maximize social welfare in the bail setting [by] . . . also us[ing] data to predict the likelihood of harms associated with detention.”<sup>318</sup> Given the emergent literature on the staggering downstream costs of pretrial detention, such a concept is more than worthy of future research.<sup>319</sup>

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316. That is to say, a person either did or did not show up to a court date or hearing. A court does not only observe a select class of failures to appear.

317. Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1488 (2017).

318. *Id.* (“For example, data on detained defendants can be used to identify factors that are most predictive of agreed-upon harms: whether someone is wrongfully convicted, whether someone loses their home, whether someone is unable to find employment in the formal labor market, and whether someone commits crime in the future.”).

319. *Id.* at 1489–90. Though Yang does not advocate for the practicality of her suggestion, she does note that “[u]ltimately, by using data to predict both the costs and benefits of pre-trial detention

C. *Where Risk Assessment Is Used: Strong, Inclusive Governance*

1. *Risk Assessments and Frameworks Should Not Recommend Detention*

For the strongest chance at reducing incarceration—and in order to keep preventive detention within constitutional limits—policymakers must ensure that risk assessment instruments and their associated decision-making frameworks do not supplant the adversary hearing and specific findings of fact that are constitutionally necessary before a defendant can be preventively detained. Finding that the defendant is a member of a collectively high risk group is the most specific observation that risk assessment instruments can make about any person. And such a finding does not answer, or even address, the question of whether preventive detention is the only way to reasonably assure that person's reappearance or the preservation of public safety. That question must be asked specifically about the individual whose liberty is at stake—and it must be answered in the affirmative in order for detention to be constitutionally justifiable.

In practical terms, this means that a responsible and well-governed risk assessment instrument will never go so far as to propose detention or suggest that the defendant not be released. Instead, for those deemed highest risk, the decisionmaking framework can and should propose that a hearing be conducted to assess what combination of conditions can reasonably assure the reappearance of the accused and public safety. It is the role of the judge or magistrate at such a hearing—not the role of a risk assessment instrument—to decide whether the defendant should be detained.

In addition to being prudent policy, our recommendation on this point is also essential as a matter of statistical practice. Today's risk assessment instruments make no attempt to measure the *change in risk* that is caused by the supportive services or supervisory conditions that a judge may impose in a particular case. And yet, it is precisely this modified level of risk that the judge must assess as the basis for a detention decision. (Another term for this change is the "responsiveness" of the defendant, as noted above in our discussion of risk assessment frameworks.) No risk assessment score and no decision-making recommendation should in and of itself trump a person's presumption of release. Likewise, such scores should never serve as *prima facie*

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for each defendant, jurisdictions could create 'net-benefit' assessment tools using largely the same set-up already employed for risk-assessment tools." *Id.* at 1490.

evidence that no condition of release would assure someone's appearance or public safety.<sup>320</sup> After all, responsiveness to conditions is not something these tools measure.

This recommendation is broadly endorsed: Civil rights groups have made this point directly,<sup>321</sup> and so too have the largest proponents assessment tools. For example, in new materials, the Arnold Foundation instructs that the decision-making framework—what it calls a “release conditions matrix”—should not include detention among its recommendations.<sup>322</sup> Instead,

If the judicial officer determines that a person is eligible for detention . . . under state law, the officer must hold a hearing in order to lawfully detain the person pretrial. [Such hearings must] adhere to certain fundamental legal foundations for detention, most of which are articulated in *United States v. Salerno*.<sup>323</sup>

The foundation “encourages [jurisdictions] to understand the law in order to use the PSA in the most legally sound manner; this necessarily includes holding a due process hearing prior to intentional pretrial detention.”<sup>324</sup> We emphatically join in that particular piece of advice.

## 2. *Risk Assessments and Frameworks Must Be Public*

Risk assessment models used in the courtroom pretrial—and the process used to develop and test them—must be public. Of course, making public the risk assessment models and the process used to develop and test them would do much to alleviate due process concerns. Risk assessment tools that rely on trade secret claims, like Equivant's COMPAS risk assessment tool, have already seen due process challenges. But it is not just defendants who fear what may be happening behind the curtain of trade secrecy. Judges may also be wary.

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320. The recent *State v. Mercedes* decision in New Jersey supports this view. *See State v. Mercedes*, 183 A.3d 914, 931 (N.J. 2018) (Albin, J., concurring) (N.J. Sup. Ct. 2018) (“The pretrial services recommendation, through the court rule, could have operated to undermine the rebuttable presumption favoring pretrial release.”).

321. *See* LEADERSHIP CONFERENCE SHARED STATEMENT, *supra* note 124.

322. GUIDE TO THE RELEASE CONDITIONS MATRIX, *supra* note 217, at 1–2 (“On its own, the PSA does not direct a judicial officer to release or detain a person or recommend a presumptive level of pretrial release (or its associated conditions) . . . Detention is not included in the matrix because eligibility for detention is based on state law, and the matrix becomes relevant only after a judicial officer decides a person will be released.”).

323. LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT IMPLEMENTATION GUIDES: 8. GUIDE TO THE PRETRIAL DECISION FRAMEWORK 10, <https://www.psapretrial.org/implementation/guides/managing-risk/guide-to-the-pretrial-decision-framework> (last visited Nov. 6, 2018).

324. *Id.*

For example, in *State v. Loomis*,<sup>325</sup> the Wisconsin Supreme Court became the first court to address the relationship between trade secrets in risk assessments and due process principles in sentencing. Although the Court ultimately rejected Loomis' due process claim, one Justice noted in a concurrence that "this court's lack of understanding of COMPAS was a significant problem in the instant case. At oral argument, the court repeatedly questioned both the State's and defendant's counsel about how COMPAS works. Few answers were available."<sup>326</sup>

Though *Loomis* involved the use of a risk assessment tool's findings at sentencing, the same problems apply pretrial. Early evidence suggests that judges diverge from the recommendations of risk assessment tools at rates that should concern reformers and policymakers alike.<sup>327</sup> One way to ensure that judicial concurrence rates with risk assessment recommendations stay high is to ensure that judges are involved from the outset with the development, design, and testing of a new pretrial risk assessment system. A criminal justice system that is better understood and debated by all stakeholders will not only enjoy greater public support, but also enjoy greater legitimacy from all of those actors. Higher perceptions of legitimacy when it comes to pretrial risk assessment likely means higher concurrence rates.

Algorithmic trade secrecy is just one problem, however. For example, the PSA is a fairly simple system that can be implemented without a

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325. 881 N.W.2d 749 (Wis. 2016).

326. *Id.* at 774 (Wis. 2016) (Abrahamson, J., concurring).

327. Early evidence indicates a high rate of judicial overrides, in which judges *depart* from the recommendations of a risk assessment tool. A report by the Cook County sheriff's office reportedly found that Cook County judges diverged from the recommendations of their risk assessment tool more than 80% of the time. See Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHI. SUN-TIMES (July 3, 2016), <https://chicago.suntimes.com/news/cook-county-judges-not-following-bail-recommendations-study-find/> [https://perma.cc/U8Y8-GNCK]; see also Stevenson, *supra* note 126, at 17–36.

Other evidence suggests that these diversions are not randomly distributed. HUMAN RIGHTS WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 93 (2017) ("[J]udges disregard release recommendations, setting bail for as much as 75 percent of all defendants determined to be 'low risk.'"); SANTA CRUZ CTY. PROB. DEP'T, *supra* note 314, at 2, 8. Santa Cruz County piloted PSA-Court from July 2014 to June 2015. During 2015, the Superior County Court considered 1,437 recommendations. *Id.* Six hundred and forty-four PSA-Court recommendations were for release and 793 were for detention. Judges departed from the *release* recommendations a little more than half of the time—53% of the time—but only departed from *detain* recommendations 16% of the time. Most of the departures, in other words, were in the direction of greater detention. *Id.* Cf. MATTHEW DEMICHELE ET AL., WHAT DO CRIMINAL JUSTICE PROFESSIONALS THINK ABOUT RISK ASSESSMENT AT PRETRIAL? 33 tbl.5 (noting that in a survey of criminal justice actors, all judges responded that they "often" or "sometimes" agree with the PSA recommendation and the vast majority of judges said that the PSA informed their release/bail decisions).

computer. And it appears that the Arnold Foundation is benevolently motivated—it provides the system free of charge. But, today, there is still a substantial amount that’s unknown about PSA. As Robert Brauneis and Ellen Goodman recently observed, the Arnold Foundation has not revealed how it developed its algorithms, why it used the data it chose to develop the system, whether it performed validation, and, if it did, what the outcomes were.<sup>328</sup> Nor has it disclosed, in quantitative terms, what “low risk” and “high risk” meant.

In order to see if court systems had this information, Brauneis and Goodman sent open records requests to sixteen different courts, only to largely be stymied.<sup>329</sup> Of the five courts that responded to their request by providing documents, four of them “stated that they could not provide information about PSA because that information was owned and controlled by the Arnold Foundation,” thanks to a Memorandum of Understanding “which contained identical language prohibiting the courts from disclosing any information about the PSA program.”<sup>330</sup> Such contractual confidentiality requirements may have some benefits. But such confidentiality can also be detrimental and worsen perceptions of procedural legitimacy.

Definitions of input data and outcome measures must also be public. By this we mean that designers should disclose precisely what a tool attempts to predict, and for what time period, based on what inputs.

For example, one of the input factors that the PSA uses to calculate a defendant’s risk of rearrest (as well as the more specific risk of rearrest for violent crimes) is whether the defendant has been previously convicted of a “violent” crime.<sup>331</sup> The specific crimes that can be prosecuted vary from one jurisdiction to another. Thus, in order to produce a PSA score, a jurisdiction must decide which of the specific charges in its local laws will be counted as “violent” crimes during scoring—by creating what the Arnold Foundation calls a Violent Offense List.<sup>332</sup> This process is supposed to consist of the jurisdiction

328. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103, 138 (2018).

329. *Id.*

330. *Id.* at 138–39.

331. See LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016), <https://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf> [<https://perma.cc/UNG8-U7C8>].

332. LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT IMPLEMENTATION GUIDES: 10. GUIDE TO THE PSA VIOLENT OFFENSE LIST 1 (2018), <https://www.psapretial.org/implementation/guides/measuring-risk/guide-to-the-psa-violent-offense-list> (last visited Nov. 19, 2018).

deciding which of its local charges fall within the *Foundation's* definition of violence. As the *Foundation's* implementation guidance explains:

[A]n offense is categorized as violent if a person causes or attempts to cause physical injury through use of force or violence against another person. To ensure fidelity to the PSA and consistency with its underlying research, a jurisdiction *must* use this definition when creating its PSA Violent Offense List. You may not use a different definition based on law or policy.<sup>333</sup>

Based on our conversations with practitioners and policymakers, we believe that some are confused about this process, and incorrectly believe that they can decide what violence will *mean* in their jurisdictions' score reports. (For example, they may wrongly believe that by adding drug crimes to their local Violent Offense List, they can consider the PSA's violence flag to be a statistically valid tool for predicting drug crimes as well as other crimes of violence.) In fact, the PSA's statistical model is not modified locally, and any jurisdiction that deviates from Arnold's definition of violence is to create a statistically incoherent situation. They would be feeding the tool information it does not expect, and preventing the tool from functioning as expected and verified in validation studies. At a minimum these definitions must be public. Clear definitions of *exactly* what an outcome measure means, and for what relevant time period, are bare minimum requirements.

The precise period of time over which rearrest and FTA are being predicted is a similarly confusing area that would likewise benefit from clear public disclosure. It would be easy for a layperson to conclude, incorrectly, that today's tools predict the likelihood of a defendant's rearrest or FTA during *that defendant's* particular pretrial period. But in order to make predictions over such individual time horizons, an instrument would need to incorporate some conjecture about how long this particular case will take to resolve, and none do so today. Instead, each of today's tools predicts rearrest and FTA over a fixed time period—such as, for example, two years. If a defendant's period of pretrial release is half as long as an instrument's time horizon, then the defendant will be less likely to be rearrested than the tool predicts. Thus, it is essential that each tool disclose and publicize the *number of days* over which it predicts rearrest or failure to appear.

Similarly, the underlying data upon which the model was originally developed must be made public in some way. As mentioned in

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333. *Id.*

section IV.B.3, aggregate-level reporting of the development sample or training data for any pretrial risk assessment tool is necessary. Such a report should at least disclose the breakdown of rearrests by charge, severity of charge, age, race, and gender. Disclosure of such data can help ensure that the model was not overly dependent on charges that are especially racially biased, like drug possession.

Overall, in order for bail reform to be best positioned to succeed, the public needs a chance to find the kinds of risks we have described elsewhere in this paper. Claims of trade secrecy or confidentiality immunize pretrial risk assessment tools from meaningful public inspection, including from judges.

### 3. *Community Oversight of the Tools and Frameworks Is Essential*

As we argued in section III.C, the role of decision-making frameworks in bail reform is sorely underexamined. Substantial attention and scholarship is directed to the pretrial risk assessment tool. But the goal of pretrial risk assessment tools is limited: to classify risk. Yes, that classification is important in and of itself. But what judges *do* with that information matters. Ideally, more scholarship and experimentation will lead to a more robust debate regarding the role and importance of decision-making frameworks.

Given the right conditions and sets of policies, decision-making frameworks could operate as a strong force for decarceration. For example, decision-making frameworks that presumptively favor release on recognizance, or the fewest, least restrictive conditions of release, for the vast majority of defendants would significantly mitigate the concerns we advance here—that systematically overestimating risk will, in turn, subject a substantial number of defendants to counterproductive conditions of release.

Of course, most decision-making frameworks are advisory. Though a decision-making framework advises a judge as to what conditions of release—or non-release—are recommended for a given defendant's level of risk, a judge is largely free to assign what conditions of release they wish. In fact, maintaining this level of judicial discretion is seen as an important political bargain.

But maintaining judicial discretion does not necessarily vitiate the need for community oversight. Ideally, a decision-making framework is the product of vibrant community input and debate, from advocates, former defendants, public defenders, district attorneys, the judiciary, policymakers, and more. At its best, the document should formalize the answer to the question: “How much risk will our community tolerate?” Understood this way, a decision-making framework would provide any

judge a strong signal as to what the community would like done with defendants of various risk levels. Accordingly, it should be the norm, not the exception, that judges concur with the recommendations of a decision-making framework.

One way to increase concurrence rates is to make the decision-making framework presumptive, not advisory, in releasing certain classes of defendants, establishing heightened evidentiary and procedural burdens for upward departures (that is, for steps that *increase* incarceration or the intensity of supervision). For example, jurisdictions might require judges to explain their decision when they diverge from the decision-making frameworks' recommendations. When judges do disagree with the recommendations of a decision-making framework—which would not be infrequent, even in a perfect world—a couple of steps could be required. First, a system could immediately capture the fact that the judge diverged from the recommended course of action.<sup>334</sup> Second, the judge could have to explain in writing why they diverged from the decision-making framework's recommendation. Ideally, this explanation should be released in machine-readable format.

Under such a system, jurisdictions could plausibly be better positioned to not only ensure that judges follow the recommendations of a decision-making framework, but also be better positioned to lock-in decarceral results. Such a system would offer valuable data to policymakers and researchers, like: how often judges diverge from the recommendations, for what types of defendants they diverge, and why they diverge. The histories of bail reform, recited above, and of sentencing reform offer current bail reformers a useful cautionary tale for limiting judicial discretion through technocratic solutions.<sup>335</sup>

## CONCLUSION

Pretrial risk assessment instruments, as they are currently used, cannot safely be assumed to advance reformist goals of reducing incarceration and enhancing the bail system's fairness. Early evidence

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334. Ideally, this would be linked to the defendant's file at hand—that way policymakers and researchers could analyze why judges deviate from the recommended course of action.

335. Note, *supra* note 291, at 1138 (“The history of sentencing reform warns that technocratic criminal justice reform can be vulnerable on nearly all fronts. Powerful system actors can hijack tools of reform toward their own economic, structural, and racial ends. In the face of political pressure and media attention, the same legislature that passes reform can waver in its commitment to evidence-based practices and undermine the project. And without buy-in, aligned incentives, and limits on discretion, prosecutors and judges can manipulate technocratic reform. Technocratic tools can be useful, but they cannot answer tough normative questions at the heart of criminal justice.”).

remains sparse, and risk assessment instruments may yet prove themselves effective tools in the arsenal of bail reform. But they have not done so to date. Shifting to risk assessment-based bail will not necessarily reduce incarceration. Without stronger policies, data practices, and open governance, we believe it is likely that these tools will perpetuate or worsen the very problems reform advocates hope to solve.

Stakeholders who are eager to reduce pretrial incarceration and improve the system's fairness and racial equity may wish to renew their energies on policies whose benefits are clearer, such as automatically releasing broad categories of misdemeanor defendants. Where risk assessments remain in use, their design and governance must be improved.

If history is any guide, the most significant impacts of today's bail reforms may turn out not to be the ones that reformers intend. By updating their models with recent, post-reform data, continuously monitoring outcomes, measuring the indicators that truly matter, opening tools to public scrutiny, and ensuring that risk assessments and frameworks never recommend detention, today's reformers can at least minimize their own risk of frustration in the vitally important work that they pursue.